VOLUME XX. NUMBER 4.

Massachusetts Law Quarterly

AUGUST, 1935

Last number of Volume XX.
(Keep covers of each number on when binding volume. They provide the index.)

CONTENTS

PAGE

EXPLANATION OF LATE APPEARANCE OF THIS NUMBER . . . *Inside of Front Cover*

NEW RULE AS TO TRUSTEE WRITS EFFECTIVE NOVEMBER 1, 1935 . *Inside of Front Cover*

RESOLVE CREATING A SPECIAL COMMISSION FOR INVESTIGATION OF THE JUDICIAL SYSTEM—REQUEST FOR SUGGESTIONS 1

UNAUTHORIZED PRACTICE OF LAW—A LETTER FROM THE ATTORNEY GENERAL . 3

OATHS, OATHS, OATHS—AND YET MORE OATHS!
A FORGOTTEN ASPECT OF THE TEACHERS' OATH STATUTE 4

NEW RULES OF COURT RELATIVE TO THE BAR 7

ARE ENTRY FEES REQUIRED IN DISCIPLINARY PROCEEDINGS? 9

THE PRESENT ORGANIZATION AND RULES OF THE GRIEVANCE COMMITTEE . . . 11

MINOR SETTLEMENTS IN THE ENGLISH COURTS 12
(From Sir George Bonner's Account of Practice Before the King's Bench Masters)

THE ADMINISTRATIVE COMMITTEE OF THE PROBATE COURTS 13

FIRST REPORT OF FEDERAL RULES COMMITTEE FOR THE DISTRICT OF MASSACHUSETTS 14

AMERICAN LAW INSTITUTE:
HOW THE COURTS USE THE RESTATEMENTS 19
PROBLEMS OF RESTATEMENT—THE PRIVILEGE OF POLITICAL DISCUSSION . . 20

PRACTICAL OPERATION OF THE MASSACHUSETTS STATUTE FOR ASCERTAINING THE MENTAL CONDITION OF PERSONS COMING BEFORE THE COURTS *Winfred Overholser* 22

THE RULE-MAKING POWER OF THE COURTS—JOHN DOE AND RICHARD ROE, THEIR PORTRAITS, HISTORY, AND SERVICES TO THE ADMINISTRATION OF JUSTICE . . . 26
THE PORTRAITS OF FEBRUARY 9 AND NOVEMBER 9, 1796 . *Facing pp. 26 and* 27
THE LIVES AND ADVENTURES OF JOHN DOE AND RICHARD ROE *Mitchell Dawson* 27
(From Chicago Bar Record)
A TRIBUTE FROM SIR FREDERICK POLLOCK 29
A TRIBUTE IN *"The Pleader's Guide"* BY JOHN ANSTEY IN 1796 30
AN ATTACK BY JEREMY BENTHAM 32
A EULOGY BY HON. ELLIOTT ANTHONY 33
LORD MANSFIELD IN ACTION ON THE BENCH—A MOVING PICTURE FROM THE PAGES OF BURROW'S REPORTS 34

PRACTICE UNDER SPECIAL POWERS OF ATTORNEY 36

SOME LEGAL HISTORY AND ITS BEARING ON THE PRESENT FORM AND MEANING OF MASSACHUSETTS WRITS 37

AN OBJECT LESSON IN THE ELECTION OF JUDGES:
CHIEF JUSTICE SHAW'S LAST MESSAGE TO ALL OF US 40
THE DETROIT JUDICIAL ELECTION OF 1935 . . . . . *Stuart H. Perry* 41
(From *The Annals* of the American Academy of Political & Social Science)

NEW RULES AS TO CONSOLIDATION FOR TRIAL OF CASES ARISING OUT OF THE SAME MOTOR VEHICLE ACCIDENT, EFFECTIVE AS OF OCTOBER 1, 1935 *Inside of Back Cover*

Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

EXPLANATION OF LATE APPEARANCE OF THIS NUMBER.

The appearance of this regular "August" number was unavoidably delayed owing to the Editor's absence during July, August and September. This fact accounts for the inclusion in this number of professional news of a date later than August.

October, 1935. F. W. G.

NEW RULE AS TO TRUSTEE WRITS.

(Received while this number was in press. Ed.)

COMMONWEALTH OF MASSACHUSETTS.

ADMINISTRATIVE COMMITTEE OF DISTRICT COURTS.

TO THE CLERKS OF THE DISTRICT COURTS:

It is provided in St. 1935, chap. 410, that "Every writ of attachment" (trustee writ) "shall contain a statement of the amount exempted from attachment under this section, and also a direction to the trustee to pay over the exempted amount as hereinbefore provided." In effect this act requires a change in the present form of trustee writs. The new form has been established and promulgated by the Supreme Judicial Court. There are no changes in the new form from that heretofore established except that after the words "And have you there this writ with your doings therein", these words must appear:

> "Said trustee and the defendant are notified that under the law, if wages for personal labor or personal services are hereby attached, from the said wages then due to the defendant an amount not exceeding twenty dollars for each week during which said wages were earned is exempt from such attachment and shall be paid by said trustee in the same manner and at the same time such amount would have been paid if no attachment had been made."

The act is effective as of November 1st. Until new writs can be made available, it would seem proper to insert in writing the above words in the old forms.

PHILIP S. PARKER,
NATHANIEL N. JONES,
CHARLES L. HIBBARD.

October 30, 1935.

Entered as Second-Class Matter at the Post Office at Boston.

THE COMMONWEALTH OF MASSACHUSETTS.

COMMISSION ON INVESTIGATION OF THE JUDICIAL SYSTEM.

Created by Chapter 62 of the Resolves of 1935.

(SEAL)

WILLIAM A. BEALE,
Secretary.

Room 249
State House

Of the Senate

HON. HARRY B. PUTNAM of Westfield, *Chairman.*
HON. P. EUGENE CASEY of Milford.

Of the House

REP. PHILIP SHERMAN of Somerville, *Vice-Chairman.*
REP. LAURENCE CURTIS of Boston.
REP. CHARLES J. INNES of Boston.
REP. PAUL J. MCDONALD of Chelsea.
REP. THOMAS J. LANE of Lawrence.

By the Governor

HON. WALTER PERLEY HALL,
Chief Justice of the Superior Court.
JOHN P. FEENEY, ESQ., of Boston.
HARRY M. EHRLICH, ESQ., of Springfield.

Frank W. Grinnell, *Secretary,*
Massachusetts Bar Association,
60 State Street, Boston.

DEAR SIR:

The commission has been authorized by the legislature to investigate and study numerous problems now confronting the judicial system of the Commonwealth. Any suggestions from you or your association on solving these problems will be welcomed by the commission.

Among the subjects to be discussed are the following:

1. Full time service by special justices of district courts with adequate compensation for such service.
2. The establishment of the district courts on a circuit or rotating basis.
3. Adequate salary with full time service for the standing justices of the district courts.
4. A revision of salary schedules for justices, special justices, clerks and assistant clerks of the district courts.
5. Abolition of the offices of special justices of district courts on termination of the tenure of present incumbents.
6. Granting the Supreme Judicial Court full power to make rules regulating pleading, practice and procedure in the courts.
7. Increasing the number of justices of the Superior Court to 41.

8. Granting the administrative committee of the district courts the power to establish the time of the opening of such courts.
9. Regulation of the practice, as attorneys, of justices, special justices, clerks and assistant clerks of district courts.
10. Providing for trial of civil actions in district courts by juries of six.

In addition, the commission will consider proposals for the abolition of sundry district courts of the Commonwealth as contained in a bill filed during the last legislative session by Rep. Philip G. Bowker of Brookline. This bill is House No. 125.

Yours truly,

/s/ W. A. BEALE,
Secretary.

NOTE.

The Special Commission has held hearings in different parts of the state which have been attended by members of the association in different counties. The commission and its individual members will welcome suggestions, either in writing or orally, from anyone after the hearings are closed but they should be made promptly.

The resolve creating the commission is printed below.

[CHAP. 62]

RESOLVE PROVIDING FOR AN INVESTIGATION BY A SPECIAL COMMISSION OF CERTAIN MATTERS RELATING TO THE DISTRICT COURT SYSTEM OF THE COMMONWEALTH, THE TRIAL OF CIVIL ACTIONS IN DISTRICT COURTS BY JURIES OF SIX, THE EXTENSION OF THE RULE-MAKING POWER OF THE SUPREME JUDICIAL COURT AND INCREASING THE NUMBER OF JUSTICES OF THE SUPERIOR COURT.

Resolved, That a special unpaid commission, consisting of two members of the senate to be designated by the president thereof, five members of the house of representatives to be designated by the speaker thereof, and three persons to be appointed by the governor, with the advice and consent of the council, of whom one shall be a justice of the superior court, is hereby established to investigate so much of the governor's address, printed as current senate document numbered one, as relates to full time service by special justices of district courts and to adequate compensation for such service, and so much thereof as relates to the establishment of district courts on the circuit or rotating basis, so much of the tenth annual report of the judicial council as relates to adequate salary with full time service for the standing justices of said district courts and so much thereof as relates to an entire revision of salary schedules for justices, special justices, clerks and assistant clerks of district courts, the subject matter of current house documents numbered one hundred and fifteen, one hundred and twenty-five, one hundred and twenty-six, one hundred and twenty-nine, sixteen hundred and seven-

teen and twelve hundred and sixty-nine, relative to changes in the district court system of the commonwealth and certain related matters, the subject matter of current senate document numbered fifteen, relative to the trial of civil actions in district courts by juries of six, the subject matter of current house document numbered nine hundred and eighty-three, relative to extending the rule-making power of the supreme judicial court, and the subject matter of current house document numbered fifteen hundred and twenty-seven, relative to increasing the number of justices of the superior court. The commission shall be provided with quarters in the state house, may hold hearings therein and elsewhere, and may expend for the employment of clerical and other assistance and to meet such expenditures as the performance of its duties may require, such sums, not exceeding, in the aggregate, five thousand dollars, as may hereafter be appropriated therefor. Said commission shall report to the general court the results of its inquiry and its recommendations, together with drafts of legislation necessary to carry its recommendations into effect, by filing the same with the clerk of the house of representatives not later than the first Wednesday of December in the current year. *Approved July 30, 1935.*

UNAUTHORIZED PRACTICE OF LAW.

The new act relative to the unauthorized practice of law (St. 1935, Chap. 346) was printed in the May number of the QUARTERLY (pp. 11–12). The successful work of Attorney General Dever and Assistant Attorney General Goldman since the passage of this statute has been reported in the press. The figures representing these activities are roughly as follows: 64 collection agencies and seven automobile associations have been closed through court action; 25 collection agencies and 11 or 12 automobile associations have been closed by agreement without court action; 60 or more collection agency cases are now pending in court on orders returnable in November. An automobile association case involving various questions of law, the decision of which will govern the disposition of a number of other associations, is now on its way to the full bench.

A LETTER FROM THE ATTORNEY GENERAL OF MASSACHUSETTS.

The following letter in regard to this whole subject was received by the Secretary and is printed for the information of members of the Association.

August 30, 1935.

Massachusetts Bar Association,
60 State Street, Boston, Mass.

GENTLEMEN:

The problem of unauthorized practice of law has always strongly concerned those who had the welfare of the bar at heart.

[*Continued on Page 21*]

OATHS, OATHS, OATHS — AND YET MORE OATHS! — A FORGOTTEN ASPECT OF THE TEACHERS' OATH LAW.

The recent "teachers' oath" law of Massachusetts has been discussed from various points of view as to its meaning, its effect on conscientious objectors and its tendency to subject education in private institutions to greater government interference, etc., but, as far as we have observed, the effect on the meaning and sanction of an oath in the public estimation has not received much attention. Accordingly, we propose to discuss that aspect of the matter.

In 1926 Massachusetts took a leading step forward in reducing the abuse of the sanction of an oath. Before then, not only was it necessary to swear to income tax returns, but also to application for a driving license, car registration, etc. The number of justices of the peace had increased so that it included garage mechanics who would take some oaths as an incident of a repair job, etc. Governor Fuller saw the absurdity of it all and began to take steps to reduce the number of justices of the peace. While this was going on, Mr. William D. Parkinson, of Fitchburg, wrote a letter to the press in 1924 in which he said:

> ". . . To carry oath-making to the extreme that makes a joke of the process of administering the oath defeats its purpose. So many oaths are required of every man of affairs that every private business office must have a magistrate in attendance, some subordinate usually being designated to operate the swearing mill just as one would be designated to wind the office clock or to lock the safe. Jurats are filled out in advance of some signatures; oaths are taken over the telephone (the right hand held up before it); men swear to the best of their knowledge and belief about matters that they cannot possibly be familiar with; errand boys are sent to them to obtain their oaths off-hand to matters of belief so vague that no court would permit them to testify about them, or to pages of figures prepared by days and weeks of labor in which they had no share and for the accuracy of which they can vouch only because of their confidence in the persons who did prepare them. In these latter cases a voucher may be a proper assumption of responsibility, but the oath adds nothing to the voucher. . . .
>
> "If 90 per cent of the oaths required . . . were to be remitted . . . it would not only save a vast volume of useless expenditure and useless labor (which is worse), but would raise the value of the other 10 per cent, and would eliminate

> a deal of genuine profanity now current both in the use of God's name in vain in the making of these useless oaths and in the more artistic and lurid types of irreverent expletives employed to express the contempt of the swearer for the process of swearing."

This letter was reprinted in the MASSACHUSETTS LAW QUARTERLY and helped to focus attention on the subject with the result that the act of 1926, chapter , (now G. L. (Ter. Ed.), c. §) was passed doing away with the perfunctory oath as a method of verifying written instruments in general. A similar bill was introduced in congress in February, 1935, by Congressman Tinkham for the purpose of dispensing with some millions of oaths now required by the federal laws. This bill, which was printed in the MASSACHUSETTS LAW QUARTERLY for February, 1935 (p. 39), was under the serious consideration of the Judiciary Committee of the House of Representatives in Washington, and it seems reasonable to hope that sooner or later the United States government and, perhaps, other states will follow the lead of Massachusetts in this respect.

Having done away with a large number of meaningless oaths in 1926, the legislature provides for a new crop of equally meaningless oaths in 1935 by the act which is printed in a footnote.*

---

*ST. 1935 [CHAP. 370]

AN ACT REQUIRING THAT AN OATH OR AFFIRMATION BE TAKEN AND SUBSCRIBED TO BY CERTAIN PROFESSORS, INSTRUCTORS AND TEACHERS IN THE COLLEGES, UNIVERSITIES AND SCHOOLS OF THE COMMONWEALTH.

SECTION 1. Chapter seventy-one of the General Laws is hereby amended by inserting after section thirty, as appearing in the Tercentenary Edition, the following new section:— *Section 30A.* Every citizen of the United States entering service, on or after October first, nineteen hundred and thirty-five, as professor, instructor or teacher at any college, university, teachers' college, or public or private school, in the commonwealth shall, before entering upon the discharge of his duties, take and subscribe to, before an officer authorized by law to administer oaths, or, in case of a public school teacher, before the superintendent of schools or a member of the school committee of the city or town in whose schools he is appointed to serve, each of whom is hereby authorized to administer oaths and affirmations under this section, the following oath or affirmation: — "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts, and that I will faithfully discharge the duties of the position of (insert name of position) according to the best of my ability." Such oath or affirmation shall be so taken and subscribed to by him in duplicate. One of such documents shall be filed with such superintendent of schools or principal officer of such college, university or school in the commonwealth and shall be transmitted by him to the commissioner of education, and the other shall be delivered by the subscriber to the board, institution or person employing him. No professor, instructor or teacher who is a citizen of the United States shall be permitted to enter upon his duties within the commonwealth unless and until such oath or affirmation shall have been so subscribed and one copy thereof so filed and the other so delivered.

SECTION 2. Every citizen of the United States who, upon the effective date of this act, is in service as a professor, instructor or teacher at any college, university, teachers' college, or public or private school, in the commonwealth, shall within sixty days after said date comply with the pertinent provisions of section thirty A of chapter seventy-one of the General Laws, inserted therein by section one of this act.

SECTION 2A. Nothing herein contained shall be construed to interfere in any way with the basic principle of the constitution which assures every citizen freedom of thought and speech and the right to advocate changes and improvements in both the state and federal constitutions.

SECTION 3. This act shall take effect on October first in the current year.

Approved June 26, 1935.

We wonder whether the legislature considered the relative importance, as a matter of public policy, of the artificial patriotism which is supposed to be stimulated in the minds of all these swearing teachers, as compared with the general weakening in the minds of persons, throughout the community, of respect for the sanction of an oath, the force of which is constantly diluted by its requirement in too many directions. In this connection, we are reminded of the old story of Theodore Hooke, who is said to have scandalized the university authorities when asked to sign the thirty-nine articles, at the time of his matriculation at Oxford, by offering to sign forty if anybody wished him to!

But perhaps the most interesting comment on the recent swearing requirement is to be found in the lines of Butler's *Hudibras*, Part II, Canto 2, lines 377–380

> "He that imposes an oath makes it,
> Not he that for convenience takes it;
> Then how can any man be said
> To break an oath he never made?"

F. W. GRINNELL.

NOTE.

Another practical, but forgotten, aspect of this oath statute involves the additional cost in time, money and storage space for preserving more waste-paper at the public expense. After some forty years of discussion, by a movement of the bar in 1912, under the leadership of Hon. William T. A. FitzGerald, the legislature was persuaded to adopt the short form of deeds act, which has avoided an enormous amount of expensive storage of useless paper containing useless words during the last twenty-three years. The tendency of governments, state and national, to require constantly increasing numbers of papers is appalling.

We do not know how many teachers there are in the public and private educational institutions of Massachusetts, but there must be a very large number. The statute provides that the oaths shall be taken and subscribed "in duplicate", one copy to be transmitted to the Commissioner of Education and the other delivered to the "board, institution or person employing" the teacher. The files of the State House and of each educational institution must, therefore, be loaded up with all these oaths and somebody must be employed to arrange them and look after them at additional cost to the public or somebody. Someone recently remarked that life was becoming "one . . . oath after another!" F. W. G.

THE NEW RULES RELATIVE TO THE BAR.

COMMONWEALTH OF MASSACHUSETTS.

At the Supreme Judicial Court holden at Boston in and for said Commonwealth on the sixteenth day of September, in the year of our Lord one thousand nine hundred and thirty-five; present:

HON. ARTHUR PRENTICE RUGG, Chief Justice.
HON. JOHN CRAWFORD CROSBY,
HON. EDWARD PETER PIERCE,
HON. FRED TARBELL FIELD,
HON. CHARLES HENRY DONAHUE,
HON. HENRY TILTON LUMMUS,
HON. STANLEY ELROY QUA,
} Justices.

Ordered, that in the rules of this court the heading, "Rules in relation to the admission of attorneys," is hereby amended by striking out the words "the admission of," so as to read, "Rules in relation to attorneys."

Ordered, further, that the third rule in relation to attorneys is hereby amended by adding thereto the following sentence: to wit: "A person who has been disbarred in this Commonwealth shall not become again an attorney except upon an application for admission as an attorney in accordance with these rules, filed not earlier than five years after the judgment of disbarment; but such an applicant shall file his petition with the clerk of the court for the county in which he was disbarred, shall not be affected by the rules requiring preliminary general and legal education, and shall be the subject of report by the board of bar examiners only as to his intellectual qualifications and legal attainments, all other questions being reserved for the decision of the court without recommendation except as otherwise specially ordered", so that as amended said rule shall read as follows:—

3.

No person who does not intend to practice as an attorney in this Commonwealth shall be entitled to be examined for admission. A person who has been disbarred in this Commonwealth shall not become again an attorney except upon an application for admission as an attorney in accordance with these rules, filed not earlier than five years after the judgment of disbarment; but such an applicant shall file his petition with the clerk of the court for the county in

which he was disbarred, shall not be affected by the rules requiring preliminary general and legal education, and shall be the subject of report by the board of bar examiners only as to his intellectual qualifications and legal attainments, all other questions being reserved for the decision of the court without recommendation except as otherwise specially ordered.

Ordered, further, that the fourth rule in relation to attorneys is hereby stricken out, and that the following is established as the fourth rule in relation to attorneys: to wit:

4.

Every application for admission as an attorney shall be referred to the board of bar examiners.

Ordered, further, that the fifth rule in relation to attorneys is hereby stricken out, and that the following is established as the fifth rule in relation to attorneys: to wit:

5.

Upon the filing of a report by the board of bar examiners recommending that an applicant be admitted to the bar, such applicant may be sworn and enrolled unless a hearing before the court shall have been applied for and ordered. Upon the filing of a report by the board of bar examiners recommending that an applicant be not admitted, there shall be entered as of course at the expiration of ninety days thereafter a judgment dismissing the petition, unless a hearing before the court shall have been applied for and ordered. After filing, every application for a hearing under this rule, and likewise every petition or other means of instituting proceedings for the disbarment or discipline of an attorney, and, after favorable report by the board of bar examiners, every petition by a person who has been disbarred for admission as an attorney, shall be presented to the chief justice, who may order notice thereon, assign a time for hearing, and designate a justice to hear the matter.

Ordered, further, that these amendments shall take effect on the sixteenth day of September, 1935, but shall not apply to a pending petition for admission by one who has been disbarred.

ARTHUR P. RUGG, Chief Justice.
JOHN C. CROSBY,
EDWARD P. PIERCE,
FRED T. FIELD,
CHARLES H. DONAHUE,
HENRY T. LUMMUS,
STANLEY E. QUA,
Justices.

ARE ENTRY FEES REQUIRED BY LAW IN PROCEEDINGS IN COURT "INVOKING A REMEDY TO PROTECT THE COURTS AND THE PUBLIC"?

For years it has been the common, if not universal, practice of clerks of court to require the payment of an entry fee when disciplinary proceedings are begun by a bar association committee or others, whether by the filing of a paper called a "petition" or a paper in the form of mere information to the court for such action as the public interest requires. These entry fees have generally been paid to avoid delay and dispute over the amount of three dollars. Under the statute, G. L. Chap. 221, Sec. 40, this amount of three dollars may be repaid, but generally it is not as it involves getting a court order and payment from the county treasurer.

With the increase in the number of proceedings called for by the public interest, a number of which consist of calling the attention of the Superior Court to its own record of the conviction and sentence to state's prison, or some other penal institution, of a member of the bar for a serious offence, these sums of three dollars, which gradually mount up, in addition to other expenses which the courts and the public expect the bar associations to meet, present not only an added problem of cost to the associations, but involve the whole theory of the relation between the court and the bar in such cases.

G. L. chap. 262, section 4 sets forth the fees "of clerks of courts" and in the fifth clause provides,

> "for entry of any *action* or *suit* or of a *petition* in the supreme judicial or superior court or for filing a petition to the county commissioners, three dollars . . . *each* of which fees shall be paid *by the party entering* the same and no other fee shall be charged for taxing costs, for issuing any subpoena, injunction or execution, or for issuing any order of notice or other mesne, interlocutory or final order, rule, decree or process authorized by law."

The next to the last paragraph of said section 4 reads as follows:

> "In civil actions which are entered by the commonwealth or by a county no entry fee shall be paid; but if the commonwealth or the county prevails the entry fee shall be taxed against the other party."

Now the first thing to be noticed about section 4 is the express limitation of the fee paragraph to adversary litigation. It imposes an entry fee in an action, suit, or petition and specifically provides that the fee shall be paid by the *party* entering the same, with the specific exception above referred to that, where the commonwealth or a county is a party, no entry fee shall be paid. The court in *The Matter of Casey*, 211 Mass. at page 193, definitely decided that a proceeding for removal from the bar "is not a proceeding between two parties." If a document filed by a bar association or any other person happens to be called a "petition" this does not make it a petition because it asks for no redress or any grievance suffered by any party to the proceeding. Such a document, no matter what its name, is nothing but information given to the court as a part of "the duty of members of the bar as public officers" which was the language used by this court in *Burrage* v. *County of Bristol* in 210 Mass. and it is still more accurately defined by Chief Justice Rugg in the *Keenan Case* (1934, A. S. 1703) as "the invocation of a remedy to protect the courts and the public."

Under these opinions, it does not seem even arguable that there is anything in G. L. Chap. 262 §4 which calls for an entry fee.

We submit that all this practice of the past, as to the collection of an entry fee, has been not only without any justification in the statutes but clearly contradictory to the express language of the court, repeatedly emphasized, that in such proceedings there are no parties, that it is a mere inquiry by the court, and that any document calling it to the attention of the court is filed as part of the duty of members of the bar as public officers, who may represent the public in this matter as much as the attorney general or the court itself, because after the information is given the bar association or the lawyer calling it to the court's attention drops out of the picture unless he is requested by the court under G. L. c. 221, §40, or otherwise is allowed, to continue, to assist the court in its own inquiry on behalf of the public interest.

Being familiar with the amount of work and expense imposed on bar associations by the expectations and opinions of the courts and the bar, and the public, we respectfully submit that the practice of collecting entry fees in such cases should be stopped by order of court so that clerks and their assistants and the county auditing officials who audit the clerk's accounts will understand the law.*

F. W. G.

* Aside from the interpretation of the statute explained above, we submit that the legislature would have no power to obstruct the judicial department, in the protection of the public interest, by imposing an entry fee on proceedings to assist the court.

THE PRESENT ORGANIZATION AND RULES OF THE GRIEVANCE COMMITTEE.

MASSACHUSETTS BAR ASSOCIATION

Committee on Grievances

EDMUND A. WHITMAN, *Chairman*

Pemberton Building, Boston

PARK CARPENTER, Marshfield
EDWARD G. FISCHER, Boston
WILLIAM E. FULLER, Fall River
RAYNOR M. GARDINER, Needham
BERT E. HOLLAND, Boston
CLIFFORD S. LYON, Holyoke
J. JOSEPH MACCARTHY, Worcester
WALTER S. PINKHAM, Quincy
JAMES M. ROSENTHAL, Pittsfield
BENNETT SANDERSON, Littleton
LUCIUS E. THAYER, Newton
MERRILL E. TORREY, Northampton
SUMNER Y. WHEELER, Salem
LISPENARD B. PHISTER, *Secretary*
912 BARRISTERS' HALL
Tel. Lafayette 7165
BOSTON, MASSACHUSETTS

Under the Amendment of the by-laws of March 15, 1935, five members constitute a quorum.

RULES FOR THE GRIEVANCE COMMITTEE OF THE MASSACHUSETTS BAR ASSOCIATION.

(Adopted September 20, 1935.)

(1) Complaints shall be made to the Secretary in writing. If the complainant is without counsel, the complaint may be prepared by the Secretary or by some member of the Committee.

(2) If the Secretary is of the opinion that the complaint is not one that requires disciplinary action, he may use his good offices to adjust it or he may dismiss it, or place it on file.

(3) When the complaint is so prepared and filed with the Secretary, a copy of it or a summary or the substance of it may be forwarded to the attorney complained of, with the request that he file with the Secretary a detailed answer to the charges within ten days.

(4) When the Secretary deems that there are sufficient complaints on file to warrant a meeting of the entire Committee, such meeting shall be called by the Chairman.

(5) The Chairman and Secretary may, in their discretion, submit any complaint with the reply thereto to any three or more members of the Committee, who shall summon the parties before them, hear their evidence and report the facts found by them to the Secretary. The Chairman shall appoint one such member as Chairman and the sub-committee shall select its own Secretary.

(6) At meetings of the Committee the Secretary shall present the evidence and conduct such cross-examination of the respondent's witnesses as he deems necessary, to the end that the Committee may act in a quasi-judicial character.

(7) The report of any sub-committee shall be submitted to the next meeting of the whole Committee.

(8) Where in the opinion of the Committee disciplinary action by the Court is desirable, their report or the report of any sub-committee duly approved shall be presented to the Executive Committee with any recommendation for discipline.

MINOR SETTLEMENTS IN THE ENGLISH COURTS.

(Extract from a Lecture on Practice before King's Bench Masters by Sir George Bonner, Senior Master and King's Remembrancer.)

In view of the repeated discussions as to minor settlements in our courts and the recommendations which have been made from time to time by the Judicial Council on the subject, the following description of the English practice is interesting. It appears in an address of Sir George Bonner which was delivered in the Middle Temple Hall in 1930, (corrected to 1934) and published by Stevens & Sons, Ltd., 109 Chancery Lane, London.

F. W. G.

"There is one more important duty to which reference should be made, and one which has in recent years grown to very large proportions—the duty of apportioning and giving directions as to the disposal and investment of funds recovered by infants, or of approving terms of settlement of an action by an infant.

"Under Order XXII. r. 25, no action by an infant, in the King's Bench Division, can be settled without the leave of a Court or judge (including a Master), and no money recovered in any such action can be dealt with except under the direction of the Court. Until comparatively recently, that is to say, within the last ten or eleven years, all such funds were transferred to the Public Trustee for investment and administration. On investigation it was found by the Masters that the costs of such administration were more than, as they thought, ought to be the rule. The Masters, therefore, decided, after consulting some of the judges, to completely alter the practice and to direct the investment of all such funds and to administer the funds themselves. The result of that decision is now recognised by Order XXII. r. 15, which came into effect in 1925. The result of this was that these funds were for a time (and occasionally still are) entirely administered by the Masters, without any charge to the infants, with the assistance of the Supreme Court Pay Office. Since 1930 it has been the practice, after approving terms of settlement upon payment of an agreed sum into Court, to make an order transferring the fund to the County Court of the district where the infant resides. Thereafter the County Court judge deals with all applications in regard to the fund.

"The Master, however, in exceptional circumstances, will retain the fund in the High Court and will deal with all applications in regard to it.

"Before approving of the settlement of an action by an infant the Master gives an appointment in his room, where the solicitors, the father, mother, or next friend and the infant are usually all present. He is thus in a position to appreciate the nature of the injury in accident cases, to ascertain the position of the parents, and then, having regard to all the circumstances, to make such an order as to the investment of the fund or otherwise as he thinks is in the interest of the infant. The same procedure is adopted in cases under Lord Campbell's Act when it is necessary to apportion damages, and under the Fatal Accidents Acts in the case of both widows and children.

"Interest on the invested fund may, where the fund is retained in the High Court, be accumulated, or the interest may be paid periodically to the parents for the benefit or education of the infant, or a lump sum may be given to one of the parents or the next friend for the purchase of necessaries, surgical or otherwise, for the infant.

"It is always open to the infant, through his parents or next friend, to apply at any time to a Master for an advance out of the invested funds for any useful purpose such as education, clothes or other necessaries, surgical appliances, or perhaps to apprentice the infant to some trade. When the infant comes of age the whole of the fund which remains is paid over to him. Under the Fatal Accidents Acts the widow may also make any necessary application, and the same procedure is adopted."

THE ADMINISTRATIVE COMMITTEE OF THE PROBATE COURTS.

Because of the expiration of the term of Hon. Frederick H. Chamberlain, of Worcester, and his declination to serve longer on the Administrative Committee of the Probate Courts under St. 1931, c. 404, Chief Justice Rugg, on October 1, 1935, assigned Hon. Mayo R. Hitch, of New Bedford, of the Bristol County Probate Court, to service on the committee for three years expiring October 1, 1938. Hon. Arthur W. Dolan, of Boston, is chairman and Hon. Harry R. Dow is secretary.

We are informed by the chairman that the Administrative Committee will be glad to receive any comments from the members of the bar as to difficulties encountered by reason of varying practices in the several probate courts, and any suggestions for improvement in the administration of such courts. Such communications may be addressed to Hon. Harry R. Dow, Secretary of the Administrative Committee, Probate Court, Salem, Mass. ED.

FIRST REPORT OF FEDERAL RULES COMMITTEE FOR THE DISTRICT OF MASSACHUSETTS.

Pursuant to a letter from the Honorable George H. Bingham, Senior Circuit Judge for the First Circuit, Judge Brewster, the Senior District Judge for the District of Massachusetts, appointed a committee for the purpose of co-operating with the Supreme Court of the United States in the formulation of general rules to govern actions at law. This authority was given to the court by a recent act of congress* (48 Statutes at Large 1064,) and it gave the court also power in its discretion to unite law and equity by general rules. Judge Brewster appointed a committee the following persons: Frank W. Grinnell, Claude R. Branch, Arthur J. Santry, Fitz-Henry Smith, J. L. Stackpole, Henry B. Cabot, Jr., and John V. Spalding. The committee has had several meetings from time to time both separately and with Judge Brewster.

It was originally the understanding of the committee that more or less comprehensive suggestions as to matters to be incorporated in the new rules were expected. In view of the speech, however, of Chief Justice Hughes before the American Law Institute on May 9, 1935, in which he stated that the court had decided not to make merely rules governing law actions but to draft rules for uniting law and equity, it is felt that it will be more helpful to submit from time to time specific suggestions for consideration in the preparation of the draft rules. Other suggestions which the committee deem to be helpful will be forwarded from time to time.

SUGGESTIONS.

1. The Massachusetts system of taking verdicts under leave reserved might well be adopted in the federal courts. The Massachusetts statute now controlling the matter is found in G. L., Chap.

* The act of congress with the first letter of the attorney general in January, 1935, was printed in the QUARTERLY for February, 1935 (pp. 41–43). The QUARTERLY for May, 1935, contains the report of the Committee on Rule-making, etc., of the Conference of Bar Association Delegates submitted to the conference at Los Angeles last July. The first part of this report (May QUARTERLY (p. 52)) deals with developments as to the federal rules and contains certain general suggestions of that committee. ED.

231, Sec. 120. We submit herewith* a printed copy of the explanatory notes of the late John L. Thorndike who drafted the Massachusetts Statute of 1915 printed below in the footnote.

This procedure has been followed in the federal courts in the Massachusetts district ever since 1915. The notes show that the practice was recognized by the English common law prior to the

*St. 1915, c. 185 (now G. L. (Ter. Ed.) c. 231, §120).

An Act to amend Judicial Procedure in respect to Practice at Trials.

1. Chapter 173 of the Revised Laws is hereby amended by striking out section 120 and inserting in place thereof the following:—Section 120. When exceptions to any ruling or direction of a judge shall be alleged, or any question of law shall be reserved, in the course of a trial by jury, and the circumstances shall be such that, if the ruling or direction at the trial was wrong, the verdict or finding ought to have been entered for a different party or for larger or smaller damages or otherwise than as was done at the trial, the judge may reserve leave, with the assent of the jury, so as to enter the verdict or finding, if upon the question or questions of law so raised the court shall decide that it ought to have been so entered. The leave reserved, as well as the findings of the jury upon any particular questions of fact that may have been submitted to them, shall be entered in the record of the proceedings, and, if upon the question or questions of law it shall be decided, either by the same court, or by the appellate court, that the verdict or finding ought to have been entered in accordance with the leave reserved, it shall be entered accordingly and, when so entered, shall have the same effect as if it had been entered at the trial.

2. Nothing herein contained shall be so construed as to limit the powers of the court conferred by chapter 236 of the acts of the year 1909 or by chapter 716 of the acts of the year 1913.

[*Approved April* 19, 1915.

(*Explanatory note submitted by Mr. Thorndike to the Judiciary Committee of the legislature.*)

This act is intended to restore the substance of 1874, c. 248, s. 2 (P. S. c. 153, s. 14), and to express more fully the course of proceeding in such a manner as not to lead to misapprehension.

In order to enable the jury to give their verdict according to the law as it ought to have been laid down at the trial, the practice arose in England early in the 18th century, for the judge at the trial to reserve leave to enter the verdict according to the direction which it might afterwards be decided that he ought to have given at the trial (Lord Blackburn in *Dublin & Wexford Ry. Co.* v. *Slattery*, 3 App. Cas. pp. 1204–1205). This was done with the assent of the jury (*Mead* v. *Robinson*, Barnes, 451 (1744); *Treacher* v. *Hinton*, 4 B. & Ald. 413, 416 (1821)), and the verdict ultimately entered was thus in fact the verdict of the jury just as if the proper direction had been given at the trial and the verdict actually entered then (*Bothwell's Case*, 215 Mass. p. 476). This was found a convenient means of correcting the mistakes of the judge at the trial and of obtaining the verdict of the jury in accordance with the rulings that he ought to have made, and it was the usual course for many years preceding 1875 (the Judicature Act) whenever the result of a trial depended on one or more questions of law.

Thus, in an action for negligence, a verdict was given for the plaintiff, with leave to enter it for the defendant according to the opinion of the court on the question of law whether the defendant was responsible for the acts of the workmen who were negligent (*Taylor* v. *Greenhalgh*, L. R. 9 Q. B. 487).

So, in an action against the acceptor of a bill of exchange payable at a banker's, the plaintiff was non-suited, with leave to enter a verdict for him, if the court decided that notice to the defendant of non-payment was unnecessary (*Treacher* v. *Hinton*, 4 B. & Ald. 413).

In an action for breach of contract, a verdict was given for £28 (composed of £8 and £20 for specified damage), beyond £2 paid into court, with leave to reduce the verdict by the £8 and £20, or either, if the court should be of opinion that the plaintiff was not entitled to both or either (*Hobbs* v. *London & South-Western Ry. Co.*, L. R. 10 Q. B. 111, 113; see also *Dittmar* v. *Norman*, 118 Mass. pp. 323, 324).

It was necessary that the leave so to enter the verdict should be reserved at the trial, in order that the verdict might be that of the jury (see *Treacher* v. *Hinton*, 4 B. & Ald. p. 417), for the court could enter only such a verdict as the jury assented to.

According to this act, where leave is reserved at the trial, the proper verdict may be entered either by the S. J. C. upon a bill of exceptions or report, or by the judge that tried the case upon motion, and in the latter case the decision of the judge would be subject to revision upon a bill of exceptions or report. By this means a judge can reserve questions of law at the trial for further consideration, which he cannot do under the existing law, as shown by *Smith* v. *Lincoln*, 198 Mass. 388, 391. The English judges often do this (e. g. *Watkins* v. *Naval Colliery Co.* [1911] 2 K. B. pp. 163, 167; *West Yorkshire Agency* v. *Coleridge*, id., 326; *Smith* v. *Martin*, id., 775, 777).

By these provisions also the practice in the state courts and in the U. S. courts in this district would be assimilated. In the latter, according to the decision of a majority in *Slocum* v. *New York Life Ins. Co.*, 228 U. S. pp. 375, 399, when a verdict for one party is set aside on the ground that there was no evidence to support it, judgment cannot be entered for the other party without a verdict of the jury for that party, although such a verdict ought to have been directed by the judge without allowing the jury to consider the evidence. By reserving leave at the trial so to enter the verdict upon decision of the question of law, the verdict of the jury is given and entered in accordance with their assent given at the trial (*Bothwell's Case*, 215 Mass. p. 476). By the U. S. Rev. Sts. s. 914, the

adoption of the federal constitution. The Supreme Court of the United States has repeatedly stated that jury trial as provided in the constitution was that which existed at common law. It would seem to follow that this practice may be adopted as a rule for all federal courts. It is believed that adoption of such a rule would avoid the retrial of many cases. See in this connection *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364.

2. It was felt that a method of discovery before trial should be permitted in law actions. Under the existing federal practice this may be done both in admiralty and in equity, but by reason of U. S. Code, Title 28, Sec. 635, interrogatories in advance of trial are forbidden. See *Ex parte Fisk*, 113 U. S. 713.

3. One of the pitfalls which today exist on the law side of the court might well be avoided in a new set of rules. This has to do with the method of preserving exceptions in a jury waived case. That the present law is quite unsatisfactory, one has only to read decisions like *Harvey* v. *Malley*, 288 U. S. 415 and *U. S.* v. *Smith*, 39 Fed. (2) 851 (C. C. A. 1).

4. It was felt that court terms have to a large extent outlived their usefulness. In altogether too many cases today difficult questions arise as to the court's power after the conclusion of a term. See *Mayer* v. *U. S.*, 235 U. S. 55. It is believed that a court ought not to be unduly restricted in its power to alter its judgments and decrees if such is necessary to meet the ends of justice.

---

practice in the U. S. courts conforms to that of the state courts (*Glenn* v. *Sumner*, 132 U. S. 152, 156; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. pp. 38–40).

The mode of proceeding under this act is illustrated by the following forms:

[*Form of Verdict &c. under* St. 1915, c. 185, s. 1]

The jury find for the plaintiff and assess damages in the sum of 818 dollars 72 cents.

A. B. Foreman

Question—In case the jury finds for the plaintiff, what additional damages should be given for the dualin manufactured before the abandonment of the contract, if the plaintiff is entitled to recover for such dualin?

Answer 350 dollars.

[See *Dittmar* v. *Norman*, 118 Mass. 319, 323]

[When the jury announce their verdict in court, the judge will say to them that a question of law has been reserved for consideration by the court, and that leave will be reserved with the assent of the jury to enter the verdict for $350 in addition to the damages found by them, if upon the question of law reserved the court shall decide that the verdict ought to have been so entered. The jury will assent, and a note of the leave so reserved will then be made at the foot or on the back of the verdict or on the docket, and the verdict entered subject thereto, as follows]

Leave being reserved with the assent of the jury to enter the verdict for $350 in addition to the $818.72 damages found by them, if upon the question of law reserved the court shall decide that the verdict ought to have been so entered.

[Leave to reduce the damages would be similarly reserved, as in *Hobbs* v. *London & South-Western Ry. Co.*, L. R. 10 Q. B. 111, 113.

In a case like *Negus* v. *Simpson*, 99 Mass. 388, 391–392, the damages would be ascertained according to the contentions of both parties, and leave reserved to enter the verdict according to the proper rule, which would have saved the second trial.

So, a verdict being directed for the defendant, leave could be reserved to enter the verdict for the plaintiff for the amount of a draft, upon the decision of a question of law, as in *Treacher* v. *Hinton*, 4 B. & Ald. 413.

So, if the jury find for the plaintiff in a case like *Slocum's Case*, 228 U. S. 364, the verdict would be entered for the plaintiff with leave reserved to enter the verdict for the defendant if the court should decide that the judge ought to have directed such a verdict.]

5. In certain cases it seemed proper to give the District Court power to report interlocutory matters to the Circuit Court of Appeals. Under existing law as the committee understands it, there is no way by which a motion to dismiss or a demurrer can get before the court until a case is ready for final judgment unless, of course, the demurrer or motion to dismiss is sustained. A court should, in its discretion, have power after overruling a demurrer to report the matter to the Circuit Court of Appeals rather than to send the case through a protracted trial only to find out later that the demurrer should have been sustained.

6. Members of the committee having experience in the admiralty as well as on the law side of the court suggest, and Judge Brewster agrees, that the admiralty rules furnish a simple and workable procedure for the trial of causes which might well be studied in connection with the draft of the rules of procedure for causes at law. This applies in particular to the joinder of causes and parties, and to the 56th rule permitting a respondent to bring in a party liable by way of remedy over, or otherwise, growing out of the same matter. A somewhat similar right exists under the English practice, known as third party procedure.

It is suggested further that the new Illinois practice act may well be studied, not only with respect to its provisions as to parties, but as to other provisions for the simplification of procedure.

GENERAL SUGGESTION.

7. In his remarks before the Law Institute, the Chief Justice said:

> "It is manifest that the goal we seek is simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances."

It seems to us that the matter could not have been stated better and that unless this purpose of the rules is kept constantly in mind the good which they are designed to accomplish will not be secured.

The need for simplicity in the rules was recognized and emphasized in the new Civil Practice Act of Illinois, which took effect last year. In a review of that act by Professor Sunderland in the *Journal of the American Bar Association* for May, 1934, he declared that litigation over the meaning and application of rules of procedure was "one of the chief causes for all three of the major criticisms made against the courts,—delay, expense and uncertainty", and that in preparing the act "this source of danger was carefully

watched, and the effort was made to eliminate every limitation, restriction and distinction which did not seem essential". We think it may be said further that the existence of technicalities of procedure as a result of which a man may lose his rights without regard to the merits of the cause is largely responsible for the layman's loss of confidence in the administration of justice in this country.

We suggest as a means of carrying out the purpose announced by the Chief Justice that the rules promulgated by the Supreme Court be general rules applicable to all the federal courts with authority to those courts to make additional rules, not inconsistent with the general rules, as may be expedient or necessary to enable each court properly to handle the matters that may come before it. Such practice will not only be in conformity with the growing public opinion in favor of giving the judges freedom of action with respect to the rules governing the trial of causes, but there is an established precedent for it in the admiralty rules of the Supreme Court.

The admiralty rules were first promulgated in 1844 under authority of an act of congress. These rules were general in form and, as amended and revised, have served with satisfaction to the present day. By Rule 46 the District and Circuit Courts were given authority to regulate their practice in all cases not provided for by the rules "in such manner as they shall deem most expedient for the due administration of justice". And that rule, now numbered 44 under the revision which took effect in 1921, is still in force.

See 2 Parsons Shipping and Admiralty, pp. 356–357.
1 Benedict's Admiralty, 5th Ed., pp. 829–831, Secs. 678, 679.

Respectfully,
For the Committee,
JOHN V. SPALDING, *Secretary.*
July, 1935. 49 Federal Street, Boston.

NOTE.

Suggestions will be welcomed and should be sent to the secretary at the address given above.

(*From American Bar Association Journal.*)

"Letters have been sent to the Federal District Judges asking for suggestions as to which of the present District Court rules have worked well and should be incorporated into the new rules.

Suggestions will also be appreciated from any member of the bar. They should be submitted to one of the District Committees,

and at the same time two copies should be mailed to Edgar B. Tolman, Special Assistant to the Attorney General in re Federal Procedure, Room 5211 Department of Justice Building, Washington, D. C."

HOW THE COURTS USE THE AMERICAN LAW INSTITUTES' RESTATEMENT.

A new and greatly enlarged edition of *The Restatement in the Courts* has just been published by the American Law Institute. It is sent to all purchasers of the Restatement of Conflict of Laws. About three-fourths of the 354 page book is given over to a series of concise citation paragraphs designed to show just how the Courts have used the several subjects of the Restatement. Of the 819 citations given, the subject of Contracts accounts for the largest fraction, with Conflict of Laws and Agency in second and third place. While Contracts would be expected to lead, having been available in official form since 1932, it is interesting to note that Conflict of Laws, existing only in tentative form until last February, has been cited more frequently than Agency, of which the official draft was issued in 1933. There are 369 Contracts paragraphs, 141 Conflict of Laws, 133 Agency, 92 Torts, 53 Trusts, 7 Property.

The distribution of the citations by states shows that the courts of every state, as well as the Federal and United States Supreme Court, have referred to the Restatement. New York, Pennsylvania, Kansas, Wisconsin, Mississippi and Maryland, in the order named, furnished the greatest number of paragraphs.

In view of the fact that the Subjects of Contracts and Agency are the only parts of the Restatement which have been available in definitive form, until a few months past, this wide-spread representation well attests the Restatement's influence. With the publication of the first two volumes of Torts last fall, and the Restatement of Conflict of Laws, last February, a considerable increase in citations seems likely, especially by the courts which have felt reluctance to cite tentative drafts.

The citation paragraphs have been prepared for the practical use of the lawyer. In a compressed, head-note style they give the pertinent factual circumstances and the holding of the court, together with the sections of the Restatement cited.

For the convenience of those who have used tentative drafts of the subjects of Agency, Conflict of Laws, Contracts and Torts, parallel tables of old and new section numbers, making possible the ready conversion of tentative draft sections into official draft sections, are included in the book.

Another useful feature of the book, which may save a good deal of page thumbing, consists of a glossary of words and phrases used in the Restatement. The glossary covers Agency, Conflict of Laws, Contracts, Property, Trusts and Torts.

PROBLEMS OF RESTATEMENT.

The Privilege of Political Discussion.

Extended discussion was aroused at the recent Torts conference of the American Law Institute, over the privilege of political discussion of public officers and candidates for office. There is a distinct split of authority, both sides of which are championed by reputable courts, as to whether the principle of fair comment upon a matter of public interest extends to and affords a protection against liability for defamation for the false allegation of facts which besmirch the character of such persons. The cases are in agreement that, if the facts are truly stated, the expression of a disparaging opinion, if it is an honest one, is conditionally privileged, so long as it pertains to the public conduct of an officer or to the qualifications of such a person or a candidate for such an office. An illustration will show the application of the rule: A published an article in a newspaper, criticizing the method of construction of certain sewers in X, declaring that there were many indications of incompetence in the performance of the work. B, the public official in charge of the construction, sues A for libel. A's remarks are privileged if they represent his honest judgment. If this condition exists, the fact that the sewers were well and competently constructed, does not defeat the immunity.

The desirability of such protection in a democracy is obvious. Public servants are accountable to the public. Even the most conscientious and scrupulously honest public officer must expect criticism. Moreover, he must expect his public life to be appraised by persons whose judgment does not conform to sound critical standards. Therefore, he knows or should know that he will be misunderstood and subjected to disparagement which is undeserved. Those who contend for political preferment cannot be thin skinned. The most that can be expected is that opinion not be misrepresented, that is, that it be a sincere expression of the critic's actual view.

Many courts, however, distinguish sharply between the expression of opinion upon facts truly stated and the misrepresentation of facts, however honestly made, the former being privileged, the latter not. This view was upheld by Judge Taft in the Circuit Court of Appeals on the grounds that "The danger that honorable and worthy men may be driven from politics and public life by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from

charges of corruption that are true in fact, but are incapable of legal proof." On the other hand, the opposite view is championed by the Supreme Court of Kansas and has been followed in a number of western states. A recent Kansas case, *Majors* v. *Seaton*, 46 P. 34 (1935), reiterates the view of the court expressed in *Coleman* v. *MacLennan*, 78 Kan. 711 (1908).

Observers insist that there is no discernible difference between the class of persons who in those states engage in public life and those who receive the protection of the stricter rule. The preliminary draft of the Restatement, now in preparation for submission to the Council sets forth the Kansas rule although the members of the Torts group are divided in their views in the matter.

[*Continued from Page 3*]

In recent years, however, this problem has become such as to seriously impair the protection which tradition and the law sought to afford the public.

The amazing growth of collection agencies, automobile associations, banks, trust companies, trade associations, protective associations, real estate associations, title examining companies, and all other forms of lay agencies too numerous to mention here that practice law, constitutes a menace to the public welfare. The bar is an indispensable part of our society as it is now constituted, and it alone can best protect the interests of the public when the latter's legal rights are affected. The situation can no longer be tolerated.

To the end that this abnormality be completely done away with, I have caused to be instituted a sweeping investigation into all forms of unauthorized practice of law. Hearings are being held daily and the evidence is being gathered as expeditiously as possible. We shall bring these matters before the court very shortly. The law would seem to be well established. The problem is merely one of gathering and presenting the evidence properly. Obviously, we need the enthusiastic and whole-hearted co-operation of a united bar, if this work is to be carried to a successful conclusion.

I cannot urge it too strongly upon the members of your Association to assist us in the accomplishment of the important task before us. Any evidence of unlawful practice should be immediately noted and submitted to our office, directed to Assistant Attorney General Maurice M. Goldman, who has been assigned by me to conduct the investigation and subsequent prosecution of any and all cases of unauthorized practice.

I invite the co-operation of the members of your Association.

Very truly yours,

PAUL A. DEVER,
Attorney General.

THE PRACTICAL OPERATION OF THE MASSACHUSETTS STATUTE FOR ASCERTAINING THE MENTAL CONDITION OF PERSONS COMING BEFORE THE COURTS.

(Sec. 99, Ch. 123, G. L., Ter. Ed.)

WINFRED OVERHOLSER, M.D.

Commissioner, Massachusetts Department of Mental Diseases.

It was the author's privilege to present in the MASSACHUSETTS LAW QUARTERLY for May, 1931 (Vol. XVI, No. 6) a discussion of the principles, history and operation of Section 99, Chapter 123, General Laws (Tercentenary Edition), and of a then recent decision of the Supreme Judicial Court defining the scope of the enactment (*Sullivan* v. *the Judges*, 271, Mass. 435). The present note gives a brief resumé of the operation of the law during the past four years, in the hope that by bringing the matter again to the attention of the bench and bar of the Commonwealth there may be encouraged a wider use of a valuable aid to the courts.

The statute mentioned was enacted in 1918, and reads as follows: "In order to determine the mental condition of any person coming before any court of the Commonwealth, the presiding judge may, in his discretion, request the department to assign a member of the medical staff of a state hospital to make such examinations as he may deem necessary. No fee shall be paid for such examination, but the examining physician may be reimbursed for his reasonable traveling expenses."

The phraseology, the intent, and the machinery provided are plain, and the Supreme Judicial Court has said in the Sullivan case above cited that the provisions are "equally applicable to civil as to criminal cases". There were, according to the Tenth Annual Report of the Judicial Council (November 1, 1934), cases disposed of or entered as follows in the various courts of Massachusetts in a single year: (The statistical year is not identical for all; the period covered in each case, however, is twelve months in 1933 or 1934, or portions of each.)

Criminal, Superior Court	17,530
Civil, Superior Court (law and equity)	3,804
Criminal cases, District Court (Number begun)	162,402
Contract and Tort cases entered, District Courts	56,145
Divorce cases entered, Probate Courts	4,578

(No data as to guardianship cases)

Considering this enormous volume of court business of all sorts, to what extent did the courts avail themselves of this method of securing impartial and gratuitous advice in cases wherein the mental state of a party might be called in question? The first table given below indicates for the years 1931 to 1934, inclusive, the number of requests made, the number of persons examined, and the type of case involved (criminal, probate, or civil). For further orientation it should be stated that the number of requests for the four preceding years was as follows: 1927, 13; 1928, 18; 1929, 23; 1930, 41.

	1931	1932	1933	1934
Total examinations requested	66	66	35	37
Total examinations made	63	63	33	36
Criminal	59	58	31	34
Probate	3	4	2	1
Civil	1	1	0	1

It thus appears that although a sudden moderate increase was noted in 1931 and 1932, the following two years showed a startling drop; furthermore, the increase was found almost entirely in criminal cases. That this should be so is perhaps not strange, since the criminal courts have been somewhat sensitized to the value of psychiatric examinations by the operation of the Briggs Law (Section 100-A, Chapter 123, General Laws, Tercentenary Edition), providing for the automatic reference to the Department of Mental Diseases for mental examination certain specified classes of accused persons (see for detailed study, Overholser, W.: "The Briggs Law of Massachusetts: A Review and an Appraisal," 25 Journal of Criminal Law and Criminology, 859, March-April, 1935). In a period of thirteen years, during which 4,392 persons accused of crime have been examined, it has been found that 15.8% have been reported as clearly or suggestively abnormal mentally. Furthermore, the Division for the Examination of Prisoners of the Department of Mental Diseases found in a study (unpublished) of 5,000 convicted prisoners serving sentence in the jails and houses of correction that 20.1% of the men and 38.9% of the women were suffering from mental disease, epilepsy, mental deficiency, or low normal or borderline intelligence. With these figures in mind, it may readily be deduced that the number of defendants in criminal cases referred under Section 99 is probably only an infinitely small proportion of those who might well have been examined with profit to the State and justice to the prisoner.

Let us turn now to the mental diagnoses offered by the examiners and to the original dispositions made by the Courts on the basis of the reports received.

DIAGNOSES AND ORIGINAL DISPOSITIONS OF THE MENTALLY ABNORMAL.

	1931	1932	1933	1934
Insane	6	1	4	5
Commitment for observation recommended	16	11	8	13
	22	12	12	18
Mentally defective	9	11	5	1
Dull or borderline intelligence	6	3	2	6
Other mental abnormalities	4	0	0	1
	41=65%	26=41.2%	19=57.5%	26=72%
Commitment to Mental Hospital	15	10	6	12
Commitment to Department of Defective Delinquents	0	0	1	1
Commitment to State School	0	2	0	0

First of all, the proportion of mental abnormalities is high, ranging from 41% to 72%. This is to be expected, since the cases are referred only because they are sufficiently striking to impress the judge or an attorney with the possibility of mental disorder. With the reference being made by a non-medical person, it could hardly fail that a case must be startling indeed to be recognized. A considerable number, it will be seen, were frankly insane, while in a larger group of cases the psychiatrist advised further observation in a mental hospital as a means of determining the subject's condition. In criminal cases the commitment of a defendant as insane or for observation is a simple matter, readily dealt with by the judge without the aid of a jury (Section 100, Chapter 123, General Laws, Tercentenary Edition). Commitment to the Department of Defective Delinquents is also a relatively simple matter for courts of criminal jurisdiction. In a civil case an application and the certificate of two physicians are necessary (Section 51, Chapter 123, General Laws, Tercentenary Edition); commitment is made by the justice of a district court except in Suffolk and Nantucket Counties, where the power is vested in the Judge of Probate. A justice of the Superior Court has the same power. Commitments to the schools for the feeble-minded are made only by the Judges of Probate.

It would naturally be expected that with the facility of commitment the courts would be inclined to accept the recommendations of the examiners, particularly in view of their acknowledged competence and impartiality. This assumption is fairly near the truth; over the four year period, of sixty-four persons who were reported insane or whose commitment for observation was recommended, forty-three, or 67%, were committed to mental hospitals. It may be that in some instances the report was overlooked in the press of work, or that the court lost jurisdiction by reason of failure to prosecute, or some other reason. It is clear that in a few cases the court saw fit to disregard the report, taking the easier way of sentencing to a penal or correctional institution with the expectation that commitment to a mental hospital, if called for, would be made by the institutional authorities. Such a practice should be deprecated. First of all, the legislature, by providing mental hospitals and legislative authority for the commitment of insane defendants, obviously intended that they should be used; again, there is now no assurance that a mentally deranged prisoner will be identified as such, except at the State penal institutions and reformatories; with the abolition of the Division for the Examination of Prisoners of the Department of Mental Diseases in 1933 psychiatric facilities were withdrawn from the county jails and houses of correction; finally, it is unfair to stigmatize a mentally irresponsible offender as a criminal by committing him to a penal institution. There should be no objection by the courts on the ground of loss of jurisdiction, since under the terms of Section 105, Chapter 123, General Laws (Tercentenary Edition), the prisoner, if found sane or if he is "restored to sanity" must be returned to the custody from which he was received.

The facilities of the Department of Mental Diseases are readily available to the courts of the Commonwealth for the purpose of furnishing competent psychiatric advice in the interest of a sound and progressive administration of justice. It is earnestly to be hoped that the provision of law discussed above may be increasingly and more effectively employed as time goes on.

JOHN DOE AND RICHARD ROE — THEIR PORTRAITS, THEIR HISTORY, THEIR SERVICES IN THE ADVANCEMENT OF JUSTICE THROUGH THE RULE-MAKING POWER OF THE COURTS.

While in London this summer, we picked up two colored prints containing portraits of John Doe and Richard Roe, both prints being dated 1796,—one issued by Fores on Piccadilly in February of that year and the other by Dighton on Charing Cross on November sixth. Both of these portraits are here reproduced in the order of their dates. Thinking that they would interest our readers, we made some hasty examination into the history of these legal heroes in order to recapture long-forgotten, or never acquired, information, and, finding an interesting article by Mitchell Dawson, Esq., Editor of the *Chicago Bar Record*, in a recent number of that periodical (for March-April, 1935) the footnotes to his account led to further inquiries which in our opinion establish Messrs. Doe and Roe, together with some of their contemporary associates in fiction, not merely as entertaining figures of the past to be ridiculed, but as worthy of serious study in connection with current problems of judicial administration.

We present the results of a hasty search partly to provide entertainment and partly to stimulate serious reflection, particularly by the tribute of Sir Frederick Pollock and the picture of Lord Mansfield in action on the bench, as a leader in the law, which rises out of the dusty, unread third volume of *Burrow's Reports*.

Just why the year 1796 produced not only the two portraits, but also *The Pleader's Guide*, which contained the tribute in verse here reprinted, we do not know. The exact month of publication of *The Pleader's Guide* in the year 1796 does not appear, but it may be that the appearance of the latter stimulated the production of the portraits, although the earliest of the portraits is dated February ninth. The title page of John Anstey's poem was as follows:

"THE
PLEADER'S GUIDE,
A DIDACTIC POEM,
CONTAINING THE CONDUCT OF A SUIT AT LAW, WITH THE ARGUMENTS OF COUNSELLOR BOTHER'UM, AND COUNSELLOR BORE'UM, IN AN ACTION BETWIXT JOHN-A-GULL, AND JOHN-A-GUDGEON, FOR ASSAULT AND BATTERY, AT A LATE CONTESTED ELECTION."
By the late
JOHN SURREBUTTER, ESQ.,
Special Pleader, and Barrister at Law."

JOHN DOE and RICHARD ROE
BROTHERS IN LAW!!

Pub.d Feb.y 1796 by S.W. Fores N.o 50 Piccadilly corner of Sackville Street, N.B. Folios of Caricatures lent for the Evening Prints & Drawings lent out on the Plan of a Circulating Library

"Drawn & Etch'd by R. Dighton.
"Pub. Novr. 6, 1796 by Dighton, Char. Cross."

We are told by Mr. James High, the well-known author of the books on injunctions and extraordinary remedies, who edited the second American edition in 1870, that "The first book of *The Pleader's Guide* appeared originally in London in 1796. Its publication was received with such favor at the hands of the profession that it was followed by the second book in 1802." Holdsworth, in his *History of English Law*, Vol. IX, p. 251, after quoting freely from the poem tells us in Note 1 that John Anstey died in 1819. When a scholar of Holdsworth's standing quotes verses to illustrate accurately the history of the law, it means that Anstey's work, like that of Dickens and Samuel Warren, contains genuine legal history. John Anstey was a son of Christopher Anstey, the rhymester and humorist, author of the "New Bath Guide". (Murray "Lawyer's Merriments" 71.)

The Lives and Adventures of John Doe and Richard Roe*

By Mitchell Dawson

(Reprinted by permission from Chicago Bar Record.)

The Honorable Elliott Anthony, writing in 1884, considered these worthies as "representatives of sturdy manhood and good government," and he ended his eulogy of their services to humanity with the statement that when England's civilization has decayed "Her influence and her glory will live in the achievements of the heroes that celebrate, honest John Doe and Richard Roe, fresh in eternal youth, exempt from mutability and decay, immortal as the intellectual principle from which they derived their origin and over which they exercised control."[1]

Another historian, Judge John Hunt of San Francisco, speaking of our protagonists in 1897 fell into an equally grievous error, attempting to give some account of John Doe's childhood.[2] It is well known that neither Doe nor Roe ever enjoyed a childhood. They were both born fully mature and ready to engage in a law suit on the very day of their birth. That much we know, although the precise date of their origin is uncertain.

They were undoubtedly the offspring of Our Lady of the Common Law; and their paternity has often been attributed to Henry Rolle, Lord Chief Justice of England during the Interregnum and author of the *Abridgment*,[4] who is said to have invented the machinery by which the action of ejectment was converted from a suit for damages to a device for trying questions of title.[5] Perhaps it would be more accurate to say that Justice Rolle was the foster father of Doe and Roe, for they were actually known to lawyers as early as 1630, being referred to in the third edition of *The Attorneys' Academy* by Thomas Powell as "J. Doo and Rich Roo." While Justice Rolle was at that time practicing law, it seems likely that he found these gentlemen already in existence, and recognizing their talent for litigation, adopted them for use in ejectment suits, changing the spelling of their patronymics in the process.

---

* Reprinted also in *Florida Law Journal* for June, 1935.

[1] John Doe and Richard Roe by the Honorable Elliott Anthony. *Chicago Legal News*, 17:111, Dec. 13, 1884.

[2] "An author, whose name is, to the speaker unknown, in his 'Commentaries on the Life of John Doe,' a work which is not yet in print, informs us that prior to the age of eight years John Doe gave no evidence of extraordinary ability." The Life and Services of John Doe, by Judge John Hunt, *The American Lawyer* 5:576 (1897).

[4] Foss, *Judges of England*, VI 472.

[5] Holdsworth, *History of English Law*, VII 11, note 5.

The early history of these brothers in law must remain obscure, but we do know that by the end of the seventeenth century they were well established in very active careers of legalized maintenance—the business of lending their names to law suits in which they had no interest.[6] They held themselves out as professional litigants to all comers, although there is no evidence that they gained anything thereby except legal immortality. They were, for that matter, probably the most obliging pair who ever lived.

One of the principal roles[7] of John Doe was to act as fictitious lessee in ejectment suits, and Richard Roe was a sort of stooge, known to the law as a "casual ejector." They put on their little skit[8] literally thousands of times, often playing in a number of courts simultaneously. They were not without competition, however, for several other gentlemen, whom we find mentioned in the law reports by such names as Fairclaim, Goodright, Shamtitle, Goodman, Wrong and Frogmorton,[9] aspiring to fame if not fortune, lent themselves as parties to ejectment suits.

The survival of Doe and Roe may perhaps be due to the shortness and rhyming quality of their names, but they also seem to have been more active and energetic than their rivals. They did not rest content with the reputation gained from their sham battles in ejectment actions but adventured into other fields of the law offering themselves as pledges or bail in all manner of actions. Jeremy Bentham considered their activities in this respect as contemptible and called the use of their names as straw bail a "vile lie."[10] But this seems rather harsh, for their conduct was in accordance with the legal practice and ethics of the times.[11] The Honorable Elliott Anthony goes to the other extreme and considers them in the nature of liberators who freed poor defendants from the necessity of producing real pledges or sureties as was required in the early days of the common law.[12]

There have been rumors that at some time in their careers these gentlemen were married, and we do find mention in the law books of Jane Doe and Mary Roe, but there is no corroboration in the marriage registers. Our only authority on this point is Judge Hunt:

. . . . . .

The friends of Doe and Roe have long lamented their decline in modern times.[13] They reached the heights of legal glory in the famous

---

[6] In a sense, of course, they did perform a real service by making the law more flexible at a time when it was being strangled by formalism. But they were wholly without discrimination permitting the use of their names by crooks and scoundrels as well as by honest men. One of the most disgraceful performances of Messrs. Doe and Roe was in the case of *Doe d. Titmouse* v. *Roe*, reported in *Ten Thousand a Year*, by Samuel Warren.

[7] "Instead, therefore, of Jones and Smith fighting out the matter in their own proper names, they set up a couple of puppets, (called 'John Doe' and 'Richard Roe'), who fall upon one another in a very quaint fashion, after the manner of Punch and Judy." *Ten Thousand a Year*, Chapter VIII.

[8] Holdsworth describes the plot of the Doe and Roe drama see *History of English Law*, VII 12. See also *Blackstone's Commentaries* II202-3.

[9] For example in such cases as *Fairclaim, ex dismiss' Fowler et al.* v. *Shamtitle*, 3 Burr. 1290.

[10] See passage hereinafter quoted.

[11] See the opening lines hereinafter quoted from *The Pleader's Guide*, by John Anstey.

[12] See passage hereinafter quoted.

[13] "The younger generation of readers may even ask who John Doe and Richard Roe were: "At this time of day, the Doe and Roe burletta seems as absurd as the story of the mongoose which was to be used as a means of curing a person suffering from delirium tremens and the delusion that he saw strange creatures crawling round a grandmother's clock; but which, confessedly, was not a real mongoose; yet, for all the unreality of Doe and Roe, they endured for centuries, and they have been in their time the means of some millions of pounds sterling changing hands." *Things I Have Seen and People I Have Known*, by George Augustus Sala, Vol. II, p. 52, London, 1894.

case of *Doe d. Roe* v. *Roe d. Doe*, which we report in full in our footnotes.[14] This learned but baffling decision resulted in a movement to prohibit fictious litigants from participating in ejectment suits and culminated in the year 1852 in abolishing the use in court proceedings of the ancient narrative of the Fictitious Lessee and the Casual Ejector.

The detractors and enemies of Doe and Roe rejoiced over what they considered a fatal blow and a premature obituary was even published in such a reputable legal journal as *Punch:*

"Well I know them; naught I owe them;
Oft, in ejectment (blow them!)
Roe I have cursed and Doe have demmed;
Law that made doth o'erthrow them,
And now to die they are condemned."

But they did not die. It is doubtful whether they ever will. While we cannot extol their virtues, we can pay tribute to their vitality.

A Tribute from Sir Frederick Pollock,

("The Genius of the Common Law," pages 70-72.)

"If the action on the case was the right hand of our lady's servants in extending her realm, the left hand was Fiction; or rather we should have to symbolize her as a Hindu goddess with many hands both right and left. *By fiction the cumbrous real actions were all but laid on the shelf, and those two good stage carpenters John Doe and Richard Roe set a scene which they left clear for the speaking actors to play their parts without further hindrance.**

---

[14] Doe on the demise of Roe, versus Roe on the demise of Doe.

This was a case of ejectment. Gabble (Q. C.) for plaintiff.—This is a clear case of ouster (Shower, 2); but if the tenant in possession disputes the title of tenant in tail, he cannot plead laches (Campbell, 1). In this case the remainder man was regularly let in, but the widow cannot now claim dower (Blackstone, 3). Suppose the mortgagee had been anxious to foreclose, then plaintiff must have been guided by the rule in Shelley's case (Adolphus and Ellis, 6). Here there is nothing of the kind. If defendant takes anything it is in the character of tenant in reversion after the possibility of issue extinct (Shower, 1).

Thumpus (Serjeant) contra.—Doe takes only a chattel interest or, at most, a base fee (Taunton, 6). The court must presume that the outstanding term is satisfied (East, 6). The rule is not now as Coke laid it down, for Mansfield (C. J.) declined taking it up. This is a case of common ouster. Doe walked in as trustee, and was kicked out in tail. There is no relief for him at common law (Bracton). The door was shut upon him by defendant's son, and the parent is not answerable for the act of the boy (Chitty). Judgment was now delivered by the court.

Mither (C. J.)—This is an uncommon case. Doe was never regularly in, nor was Roe regularly out. Both took as devises of the same testator. The case in Shower cannot guide us here, though the rule laid down has been recognized. I do not think there is much in the objection to the widow's claim of dower, though I see I have got it upon my notes. A mortgagee may suffer by laches, but then the defendant should have pleaded the tort. There is nothing of this on the record, and the verdict must go accordingly.

Puny (J.)—I am of the same opinion. My brother Thumpus has referred us to Bracton. I know the point in Bracton, and have decided it twice the other way. But here I think the rule in Shelly's case comes in and carries the verdict.

Twaddle (J.)—There are four points in this case; three of them amounted to nothing, and the fourth has been conceded. The laches ought to have appeared on the pleadings. There cannot be a use upon a use (Sanders), but a trustee may take by the common law, which the statute, Jac. II, c. 14, did not interfere with. The provisions of the act removed much abuse, and the eighty-fourth is a particularly wholesome section. Here these questions do not arise, and, as the rule is clear, the verdict must follow it.

Shiver (J.)—I am of the same opinion.

1 *Comic Almanack* 347 (1843).

* It might have been better to simplify and rationalize the principal real actions, as indeed several American States have done. But it would take us altogether too far, in our present short course, to stop for discussion of what might have been . . .

By fiction, the fiction of conclusively presuming that a man had promised to pay what he owed, Assumpsit annexed the territory which formalism would have reserved for Debt. By a new and most ingenious fiction, almost in our own time, Willes and his brethren gave us a complete remedy for the case of an agent who professes, whether in good or in bad faith, to have an authority which he has not. True it is that the fiction was called for only by reason of a stupid maxim due to some unknown medieval bungler who had dabbled in Romanist phrases. By fiction our lady the Common Law borrowed the name of a still more exalted lady, St. Mary-le-Bow in the ward of Cheap, to stretch the power of her arm beyond the four seas, as Governor Mostyn learnt to his cost. It is easy to laugh at these and other fictions that our fathers made in their need. Their outer garb may be quaint, even grotesque; but in every case there was a sound principle of justice under these trappings, and the ends of justice could not be otherwise attained. . . .

Uniformity of Process Act, Common Law Procedure Acts, Judicature Acts, these in our fathers' time and our own took down the queer untidy scaffolding of procedural devices; but without the scaffolding the builders could not have worked."

THE TRIBUTE (?) OF "JOHN SURREBUTTOR" (JOHN ANSTEY)

From the "Pleader's Guide," Book I, Lect. VIII, p. 67. (1796)

"Then let us pray for writ of *PONE,
JOHN DOE and RICHARD ROE his Crony,
Good men, and true, who never fail
The needy and distress'd to bail,
Direct unseen the dire dispute,
And pledge their names in ev'ry suit. . . .
Sure 'tis not all a vain delusion,
Romance, and fable ** Rosicrusian,
That spirits do exist *without*,
Haunt us, and watch our *whereabout;*
Witness ye visionary pair,
Ye floating forms that light as air,
Dwell in some SPECIAL PLEADER'S brain;
Am I deceiv'd? or are ye twain
The restless and perturbed Sprites,
The manes of old departed Knights,
Erst of the Post? whose frauds and lies
False Pleas, false Oaths, and *Alibis*

* "*Pone* — The Pone is the Writ of Attachment before mentioned, it is so called from the words of the Writ, *pone per vadium & salvos plegios, 'Put by Gage and safe Pledges, A. B.'* John Doe and Richard Roe."

** "*Rosicrusian* — For an account of the Theory of the Rosicrusian system, see Pope's *Rape of the Lock.*"

Rais'd ye in Life above your Peers,
And launch'd ye tow'rds the starry Spheres,
Then to those mansions 'unanneal'd,'
Where unrepented sins are seal'd:
Say, wherefore in your days of flesh
Cut off, while yet your sins were fresh,
Ye visit thus the realms of Day,
Shaking with fear our frames of Clay,
Still doom'd in penal Ink to linger,
And hover round a Pleader's finger,
Or on a Writ impal'd, and wedg'd,
For Plaintiff's Prosecution pledg'd,
Aid and abet the purpos'd ill,
And works of Enmity fulfil,
Still domm'd to hitch in Declaration,
And drive your ancient Occupation?
While thus to you I raise my Voice,
Methinks I see the Ghosts rejoice
Of Lawyers erst in Fiction bold,
LEVINZ, and LUTWYCHE, Pleaders old,
With Writs and Entries round him spread,
See plodding SAUNDERS rears his head,
Lo! VENTRIS wakes! before mine eyes
BROWN, LILLY, and BOHUN arise,
Each in his Parchment shroud appears,
Some with their Quills behind their ears,
Flourish their velvet Caps on high,
Some wave their grizzel wigs, and cry
Hail happy Pair! the Glory, and the Boast,
The Strength and Bulwark of the legal Host,
Like ***SAUL and JONATHAN in Friendship tried,
Pleasant ye liv'd, and undivided died!
While Pillories shall yawn, where erst ye stood,
And brav'd the torrent of o'erwhelming mud,
While gaming Peers, and Dames of noble Race,
Shall strive to merit that exalted Place;
While righteous Scriv'ners, who when Sunday shines,
Pore o'er their Bills, and turn their noughts to nines,
(Their unpaid Bills, which long have learn'd to grow
Faster than Poplars on the banks of Po,)
Freely shall lend their charitable aid,
To young Professors of the gambling trade;
While Writs shall last, and Usury shall thrive,
Your name, your honor, and your praise shall live:
Jailers shall smile, and with Bumbailiffs raise
Their iron voices to record your Praise,
Whom Law united, nor the Grave can sever,
'All hail JOHN DOE, and RICHARD ROE for ever.'"

*** "*Saul* — 'Saul and Jonathan were pleasant in their Lives, and in their Death they were not divided.' — *2d Samuel*, c. 1, v. 23."

An Attack by Jeremy Bentham.

Bentham, who was always caustic about fictions and other roundabout proceedings, regardless of the practical obstacles to more direct progress, wrote as follows in his *Rationale of Judicial Evidence*, (*Works* VII, 284):

> "Take next the case of sham bail, and sham pledges of prosecution.
>
> "In the infancy of the technical system of English procedure, the performance, on the part of the plaintiff, of an operation called by the name of *finding security*, was established in the character of a condition precedent to the subjecting a man, in the character of defendant, to make answer in any way to a judicial demand. The security was real, but eventual only, and not deposititious: a pair of friends binding themselves (though by promise only, and not, as in case of pawning goods, by actual deposit) to pay a sum of money, preliquidated or not preliquidated, certain or uncertain, in case the plaintiff should lose his cause. *Pledges of prosecution* was the name given to these friends.*
>
> "No such pledges are in any case found; a certificate of their being found is in every case given: and the certificate is among the countless host of lies, notorious lies, without which English judges know not how to administer what in their language goes by the name of justice.
>
> "So in the case of sham bail, on the part of the defendant. The defendant pays an attorney, who pays an officer of the court for making, in one of the books of the court, an entry, importing that on such a day two persons bound themselves to stand as sureties for the defendant; undertaking, in the event of his losing his cause, and being ordered to comply with the plaintiff's pecuniary demand, either to pay the money for the defendant, or to render his body up to prison. No such engagement has been taken by anybody. The persons spoken of as having taken it, are not real persons, but imaginary persons; a pair of names always the same, John Doe and Richard Roe.
>
> "The impossibility that this vile lie should be of use to anybody but the inventors and utterers of it, and their confederates, is too manifest to be rendered more so by anything that can be said of it.
>
> "In the original institution of this security, the 'pledges of prosecution', as little regard was paid to the ends of justice, as in the subsequent evasion of it."

* Blackstone, III. Append. XIII.

A Eulogy by Hon. Elliott Anthony.

"It is commonly supposed that the law affords but little scope for the imagination or for ideal creations. Being a matter of fact science, neither romance nor poetry are its chief attraction. It is not, however, wholly an abstraction, . . . but sometimes indulges in allegory and occasionally, fiction. It has its fictitious characters as well as real characters, and to each is assigned their proper position in the progress of a legal contest. Considering the obscurity of their birth, their humble origin and the fact that they performed the simple part of 'friends at court' no two personages have ever attained greater celebrity than John Doe and Richard Roe. The name of Doe is entered on the rolls as John Doe, yeoman, while that of Roe is put down as Richard Roe, gentleman.

"It is due to the truth of history, that the social position of these men should be vindicated, for both were yeomen and both gentlemen of repute in the neighborhood where they resided.

. . . . . .

"The part that they played in the administration of the law, is not apparent by a bare statement of the fact that as ideal creations they took the place of real and substantial pledges; but it is, rather, that with their advent came other and greater changes of more significance and greater consequence.

"It is to these ideal personages, the dry narrative of whose history we have here presented, that we pause to pay a passing tribute.

"To their advent do we attribute the first great advance in the administration of the law, and they stand forth on the page of history as the foremost figures of the times. The relaxation of the ancient law which required real pledges on the part of the plaintiff before he could prosecute a just claim against his neighbor, led speedily to other changes in the law as respects the arrest and imprisonment of a defendant, the revision of the law relating to criminal offenses and many other things.

"Indeed John Doe and Richard Roe were the precursors of a most important era in English history and English law, and their appearance marks the boundary line of bar-

barism and modern civilization. They stand for reform; for a change in the treatment of litigants and especially the treatment of defendants, who were quick to take advantage of the first relaxation of the ancient law, and the simple changes in the ancient forms and methods were followed up by a revolution that emancipated many helpless debtors from the cruelties and oppressions of sheriffs and their deputies, who at one time held the keys almost of life and death. The venality and corruption of these men, and the treatment to which they often subjected defendants who were in their custody awaiting their opportunity and turn to give bail, is shocking to humanity. The horrors of the prisons in England two hundred years ago almost surpass human belief, and no writer has ever yet done justice to the subject. There was a long and bitter contest waged over the abuses of arrest on civil process and the introduction of John Doe and Richard Roe as fictitious sureties on behalf of the plaintiff, and the contest went on from year to year until the abuses of civil process and especially that of arrest, the abuses and corruption of sheriffs and tipstaves, the abuses in the public prisons and a revision of the list of criminal offenses and misdemeanors until a new era dawned." 17 *Chicago Legal News* 111, (1884).

LORD MANSFIELD IN ACTION ON THE BENCH AS A LEADER IN THE ADMINISTRATION OF JUSTICE.

"The proof of the pudding is in the eating" and the actual progress made by the courts with the assistance of Messrs. Doe and Roe, and their less known contemporaries, in the face of the habitual inertia of the profession and the community appears in the case of *Fair-claim, ex dismiss' Fowler et al.* versus *Sham-title,* in Ejectment (3 Burrow's 1290, 1292–1296):

> "LORD MANSFIELD — in ejectments, the court can never want jurisdiction to prevent the plaintiff from recovering without a proper trial. An ejectment is the creature of Westminster-Hall introduced within time of memory; and moulded gradually into a course of practice, by rules of the courts. The same authority which brought it thus far, may certainly carry it to a higher degree of perfection, as experience happens to shew inconveniences or defects. . . .

"An ejectment is an ingenious fiction, for the trial of titles to the possession of land.

"In form, it is a trick between two, to dispossess a third by a sham suit and judgment.

"The artifice would be criminal, unless the court converted it into a fair trial with the proper party.

"The control the court have over the judgment against the casual ejector enables them to put any terms upon the plaintiff, which are just. He was soon ordered to give notice to the tenant in possession. When the tenant in possession asked to be admitted defendant, the court was enabled to add conditions; and therefore obliged him to allow the fiction, and go to trial upon the real merits.

"It might happen, that the tenant in possession was a mere farmer at will. He was bound to give notice to his landlord.

"The same reason, of a fair trial with the proper party, required the landlord to be admitted defendant; with the tenant, if he was amicable; or without him, if he, contrary to the duty of his relation, should betray the cause.

"There can be no ground for admitting the landlord to be a co-defendant, which does not hold to his defending alone in case the other abandons.

"The plaintiff ought not to recover by collusion with one, to the prejudice of a third: he ought not to recover, without a trial with the person interested in the question and affected by the judgment.

"Every point relative to the proceeding in ejectments is of consequence. I am glad we have this occasion.

"There are two matters to be considered: . . .

"His Lordship proposed to have the fundamental principles considered; and old cases prior to the act of parliament looked into; and declared that he had it at heart, 'To have the practice upon ejectments clearly settled, upon large and liberal grounds for advancement of the remedy.'

"The great advantage of this fictitious mode is, that being under the control of the court, it may be so modelled as to answer in the best manner every end of justice and convenience.

"Public utility has adopted it in lieu of almost all real

actions: which were embarrassed and entangled with a thousand niceties. But as there was good and bad in the method of real actions, the good ought to be grafted into ejectments, in such manner as to avoid the bad.

"He added, it is worth considering, upon what principles landlords were admitted to be ex-defendants, before the act of 11 G. 2. And desired that everybody, that knew of any old cases prior to the act, would inform the court of them. He mentioned a loose note in 12 Mod. 211. and the case of *Goodright* v. *Hart* in 2 Sir F. S. 830. . . .

"Lord Mansfield proposed to have it considered, whether there can be any reason for making a landlord co-defendant, which will not also hold for making a landlord defendant in the stead of the tenant; and also to have it considered upon the foot of convenience and expedience; and how it stood before the act of 11 G. 2. as well as to argue it upon the act; and also what was the definition of a landlord, as it was understood when they were admitted as co-defendants before the act.

"It was then ordered to stand for further argument on Wednesday, 3d February, 1762."

David Murray in *Lawyers' Merriments* (pp. 64–5) quotes again from the *Pleader's Guide*

"Thrice honour'd be that Lawyer's Shade
Who Truth with Nonsense first combin'd,
And Equity with Fiction join'd."

PRACTICE UNDER SPECIAL POWERS OF ATTORNEY.

St. 1935, Chap. 346, Sec. 3 repealed Sec. 49 of Chap. 221 of the G. L., which provided that

"Any person of good moral character, . . . may manage, prosecute or defend a suit if he is specially authorized by the party for whom he appears, in writing or by personal nomination in open court."

In the QUARTERLY for May, 1935 (p. 49), we printed a copy of an supplemental "information" which was filed by the officers of the Massachusetts Bar Association in a case begun by a local association in which an individual was charged with practising law under these special powers of attorney. Since the passage of the act referred to, the Superior Court issued an order in that case restraining such practice by the individual concerned. There may be other cases in which similar action is needed.—Ed.

SOME LEGAL HISTORY AND ITS BEARING ON THE FORMS OF MASSACHUSETTS WRITS.

While looking into the history of John Doe and Richard Roe, we happened on some interesting history in Anstey's *Pleader's Guide* of 1796 and Holdsworth's *History of English Law* (Vol. IX, pp. 249–252) which seems of current practical importance in connection with the revision of the form of summons suggested by the Judicial Council

In 1926, the Judicial Council made its first recommendation for a revision of the forms of writs and summonses in its second Report (pp. 37–44) and then suggested drafts of writ and summons, of trustee writ, of subpoena and of Land Court notice which appear on pp. 40–42 of that report. The Land Court notice, which required legislation, was adopted by St. 192, c. . As to the other suggestions, there was a continuation of informal discussion from time to time until 1933, when, after further consideration by the Judicial Council of a prolonged character, they decided that as most of the loss of time and wages, etc., resulted from the misleading command to defendant to "appear", in the summons, the thing calling for immediate revision was the summons and certain items in the trustee writ or connected with the trustee writ; and that these changes could be made without waiting for technical study and uncertainty of agreement on any proposed form of revised writ.

Accordingly, the Council announced in its ninth Report, in 1933 (p. 38), that "revised forms of summons in civil cases and of trustee writs" had been submitted to the Supreme Judicial Court for consideration under G. L. c. 233, sec. 16. In the discussion of these limited proposals the question arose whether it would not be a mistake to change one of the writs without making a more thorough study and general revision of all of them, and, particularly, whether the summons was not so dependent upon the original writ, which directs the summons to be served by the sheriff, that the summons could not properly be changed in legal theory without a corresponding change in the writ. The words "to appear" used in the writ and summons, having had the original meaning of actual physical appearance. Meanwhile, the clerks of court in many of the courts in the Commonwealth have done their best to meet the difficulty by printing an explanatory warning on the summons to the effect that the language of the summons does

not mean what it says, but means something else. While there are no rules of court authorizing these warnings, they are used and acted upon with the full knowledge of the bench and bar. The actual situation strongly resembles the use of practical "fictions" in the earlier stages of modern procedure.

As to the dependence of the summons on the writ, the following practice seems illuminating. Prof. Holdsworth says (Vol. IX, p. 250):

> "Of all these methods of beginning an action the most common was a *capias ad respondendum*, i. e., a writ directing the sheriff to arrest the defendant. This process was possible in all the most usual personal actions; and, where it was possible, it became the practice, in the course of the eighteenth century, to 'resort to it in the first instance, and to suspend the issuing of the original writ, or even to neglect it altogether, unless its omission should afterwards be objected by the defendant. Thus the usual *practical* mode of commencing a personal action by original writ is to begin by issuing, not an original, but a capias.' As the author of the *Pleader's Guide* said:—
>
> 'Still lest the Suit should be delayed,
> And Justice at her Fountain stayed,
> A *Capias* is conceived and born
> Ere yet th' ORIGINAL is drawn,
> To justify the Courts proceedings,
> Its Forms, its Processes, and Pleadings,
> And thus by ways and means unknown
> To all but Heroes of the Gown,
> A Victory full oft is won
> Ere Battle fairly is begun;
> 'Tis true, the wisdom of our Laws
> Has made Effect precede the Cause,
> But let this Solecism pass —
> *In fictione aequitas.*
>
> "But the original was always supposed; and the defendant could always object to its absence, and compel the plaintiff to procure it from the office of the cursitor."

If thus asked for, the only result would be that the plaintiff would procure one from the cursitor's office *ex post facto* at the trouble and expense of a petition to the Master of the Rolls.

As to the meaning of the word "appear" as used in our writs and summonses, the following passage from Holdsworth (p. 252) following the description already quoted as to the omission of the

original writ, seems to show that the meaning of the word had already acquired a purely technical meaning before the Constitution of Massachusetts came into existence and before the statute of 1784, or thereabouts, recognizing the authority of the Supreme Judicial Court to adopt or alter the forms of writs then in use.

Professor Holdsworth says:

> "*The appearance of the defendant.* — It is clear that the evolution of the rules, which have just been described, for beginning an action, is intimately bound up with the evolution of the rules for securing the appearance of the defendant. Just as in legal theory an action was begun by an original writ, so in legal theory both plaintiff and defendant must appear personally in court by themselves or their attornies, but in both cases theory was widely divorced from the actual facts. Though a personal appearance was still in theory required, 'it exists,' says Stephen, 'in fiction or contemplation of law' only. 'In fact appearance is effected on the part of the defendant (where he is not arrested) by making certain formal entries in the proper office of the Court expressing his appearance, or, in case of arrest, it may be considered as effective by giving bail to the action. On the part of the plaintiff, no formality expressive of appearance is observed, but, upon appearance of the defendant, effected in the manner above described, both parties are considered *as in Court.*' "

Accordingly, as we understand it, by the common law the word "appear" had already come to signify, *in civil cases,* a purely technical appearance. Unless we have overlooked something, there seems nothing in our Massachusetts law to give the word "appear" in a *civil* writ any other meaning than a technical appearance. If this is so, a change in the form of summons to explain this, like the warnings now printed by the clerks, would simply explain the present *legal* meaning of the writ better than the present traditional form does.

F. W. G.

AN OBJECT LESSON IN THE ELECTION OF JUDGES.

In his last public utterance shortly before his death in 1861, after thirty years of service as Chief Justice of the Supreme Judicial Court of Massachusetts, Lemuel Shaw gave the following permanent message to the bar and the people of the Commonwealth:

> "Above all let us be careful how we disparage the wisdom of our fathers in providing for the appointment to judicial office, in fixing the tenure of office, and making judges as free, impartial, and independent as the lot of humanity will admit. Let no plausible or delusive hope of obtaining a larger liberty, let not the example of any other State, lead you in this matter to desert your own solid ground, until cautious reason or the well-tried experiment of others shall have demonstrated the establishment of a judiciary wiser and more solid than our own." (See Chase's *Lemuel Shaw—Chief Justice,* 188).

In the QUARTERLY for February, 1922 (Vol. VII, No. 3) appeared an extended discussion of our system prepared in connection with proposals then pending before the legislature together with information as to the operation of the elective system in certain states.

The recent constitutional amendment in California abandoning the elective system and the rapidly growing movement in other states in support of a return to the appointive principle, which Massachusetts has always retained, make the following account of the recent judicial election in Wayne County, Michigan, of peculiar interest to Massachusetts. It adds emphasis to the statement made years ago by Dean Pound to a committee of the Massachusetts legislature that while no system is perfect in its operation, the people of Massachusetts ought to go down on their knees every day and thank God that they did not have an elective judicial system. The following account is reprinted by the courtesy of the American Academy of Political and Social Science and of the author.

F. W. G.

The Detroit Judicial Election of 1935*

By Stuart H. Perry†

I am glad that the subject that I am to deal with has been narrowed down to the question whether we should elect or appoint judges. Even with its scope thus restricted, a full treatment would require an analysis of existing evils in the administration of justice, and then the thesis should be established that those evils are due chiefly to the influence of politics, that the influence of politics derives from the practice of electing judicial officers, and therefore that the proper remedy is appointment instead of election. So for the purpose of this discussion I will assume the premise that most of the present evils, and the worst of them are due to politics—evils such as unfit judges, the degeneration of trial by jury, the delays and other gross abuses in procedure, and the unwholesome relationship between the judiciary and the press.

Judiciary Controlled by Politics

Politics is not merely a contributing factor in the production of these evils, It is, in the language of Aristotle, the efficient cause. It directly produces them. In many situations they are not merely a logical but an inevitable result of politics, and it is only remotely conceivable that they could result from other causes.

The word "politics" is here used in its ordinary sense, as meaning the practical process of getting and keeping official position. As regards the judiciary, that process means election in most of the states, not only for judges but also for clerks, prosecutors, commissioners, and other judicial officers.

---

*An address delivered at a meeting of the American Academy of Political and Social Science on May 24, 1935, and published in the Annals of the Academy for September. Reprinted by permission of the Academy and the author.

†Mr. Stuart H. Perry is publisher of the Adrian (Mich.) Telegram, a director of the Associated Press, a member of the advisory committee of the Columbia University School of Journalism, and a member of the Michigan Judicial Council.

[1]"Politics and Judicial Administration." The Annals, Vol 169, 75 (Sept. 1933). (Reprinted in this Journal, Vol. 17, p. 133. Ed.)

See also "The Judiciary and the Press—What Shall Be Done to Free Justice From Politics?" in this Journal, Vol. 16, p. 108.

In a contribution to The Annals two years ago,[1] I outlined historically the change from an appointive to an elective judiciary, and the process whereby politics invaded the administration of justice in state courts. That invasion is now complete in most of the states, and in them the office of judge is as thoroughly political as the office of sheriff, mayor, or legislator.

Being wholly controlled by politics, the judiciary and the administration of justice are what politics makes them in each particular locality. Springing from politics, they usually do not rise higher than their source. In rural counties where population is stable in character, of native birth, and well educated, politics is clean, voting is intelligent, and the results usually are from fair to good; in large cities where politics reaches the lowest levels, the results are seen at their worst. It seems an inescapable conclusion that the only way to remove the evils of the elective system is by appointing judges to serve during good behavior, thus making them genuinely independent and uninfluenced by either the fear or the favor of voters.

Unfortunately the diversity of results under the elective system, to which I referred, has proved an obstacle to that reform. The people of a city, familiar with the degraded administration of justice in their courts, may be quite ready to make judges appointive; but in a rural county, people say, "We are getting good judges now, so why change?"

That view is illogical because it takes no account of any causal relation—of whether they get good judges because of the elective system, or in spite of it. In a rural county of high-grade citizenship, fairly good judges would be obtained under almost any system. The results might be satisfactory even if judges were chosen by the county medical association, the women's clubs, or the Spanish War veterans.

It is no recommendation for a system that it will work well where any system would work well. To be really sound, a system must work in spite of adverse or subversive influences. By that test, the elective system fails. It works only where conditions are most favorable and where bad influences are absent—where the electorate is intelligent and of native stock, where the population is not large or shifting, where candidates are few and well known, and where the influence of practical politics is weak.

The *reductio ad absurdum* is a sound logical process for exposing a fallacy. In other words, if we think a proposition through, or carry it to its ultimate conclusion, we discover weaknesses that

are not revealed in a more limited application. So let us apply that method of reasoning to the election of judges.

If it be true that the elective method is sound, then judges should be "close to the people" in the political sense, competition should be open to any number of candidates, and the voters can be depended upon to choose the best men intelligently and honestly. Such a system therefore ought to work well in a large community, where numerous important judgeships are to be filled, and where the voters are presumably well informed by extensive and long continued discussion and publicity. I will give you an example of that kind—the recent judicial primary and election in Wayne County, Michigan, which includes the City of Detroit. It is an egregious example—amazing and revolting—so grotesque that the description would be almost incredible if it were not supported by figures and exhibits.

The Detroit case is so illuminating, and exemplifies so fully the evils in the elective system, that I feel justified in proceeding to a rather extended dissection of the facts. The primary and the election, it should be stated, were free from corruption or intimidation; but otherwise the whole episode forms a demonstration of all the evils that could well be imagined in the selection of judges.

The Detroit Situation

Wayne County has a population of about 1,900,000 according to the last census, of which 1,677,000 are within the city limits of Detroit—this total including the political enclaves of Hamtramck and Highland Park, which are separate cities in the heart of the greater city.

The circuit court for Wayne County, which has general civil jurisdiction throughout the county and criminal jurisdiction in cases arising outside the City of Detroit, comprises eighteen judges, and it so happened that the terms of all of them expired in the spring of 1935. The candidates for these eighteen positions were nominated in party primaries. In addition there are three Detroit city courts for which candidates were nominated in a nonpartisan primary: the recorder's court, a criminal court, to which ten judges were to be elected; the court of common pleas, a civil court of limited jurisdiction, to which five judges were to be elected; and the traffic division of the recorder's court, to which two judges were to be elected. Thus within the City of Detroit there were thirty-five judicial positions to be filled. Of these the eighteen circuit judgeships were the most important, and their salaries of $14,500 were the highest.

As long as four or five years ago Detroiters, and especially Detroit lawyers, began to express fear as to what might happen when those eighteen places on the circuit bench had to be filled at one time. Ten of the incumbent judges were originally appointed by the governor and later elected. All eighteen were experienced, thirteen of them having by 1935 sat for ten years or more on the circuit bench. The court enjoyed a high reputation, and there was danger that in the double scramble of a primary and an election some of the experienced judges might be replaced by less desirable men.

That danger as it actually developed was worse than the most apprehensive ones ever dreamed of. Before 1932 Michigan was strongly Republican. All the judges with one exception were Republicans, and it did not then seem likely that many of them could be replaced by Democrats. What was chiefly feared, therefore, was the defeat of some of them in a Republican primary. But then came the Democratic tidal wave of 1932, and new dangers appeared that made such earlier fears seem trivial.

The wave swept city and State alike. The victorious political army was aggressive, ravenous for the spoils of office, and eager for further victories. The sudden and complete triumph of a minority party also produced the usual unfortunate results as to official personnel; for during its long ascendancy in Michigan the Republican party had absorbed a large share of the talent and ability in the public service of the state, and nearly all the political experience. Such was the stage setting for this extraordinary election.

The Rush of Candidates

Though the Democratic wave was checked in 1934 and a strong Republican reaction returned the state to the Republicans in November, there still was a general belief in Detroit that the April 1935 election promised a great harvest for Democratic office seekers. The result was a rush of candidates for judicial nominations.

In the party primaries for the 18 circuit judgeships there were 220 candidates; in the non-partisan primaries there were 48 for the recorder's bench and 40 for the court of common pleas—a total of 308 candidates for judicial offices. More than one lawyer out of every ten in Detroit wanted to be a judge. Nominations were also to be made for three non-judicial offices, which brought up the total of all primary candidates in Wayne County to about 400.

To simplify the narrative I will confine myself to the elections for the circuit bench:

The number of candidates and the size of the

electorate made impossible anything like an intelligent popular selection. The majority of Wayne County's 543,000 voters could not name half of the eighteen judges actually on the bench. Hardly anyone outside of the bar could name them all. Tens of thousands could barely recognize the names of a few judges, without being sure which court they belonged to, and without understanding the difference between the circuit, recorder's, and common pleas courts. An intelligent selection therefore would have been impossible even if there had been but two candidates for each position. With 220 candidates for the circuit bench and 88 for other benches, the situation became fantastic.

The Republican primary ticket bore the names of 39 candidates for the 18 nominations, of whom 16 were Republican judges, seeking reëlection. The Democratic ticket listed no fewer than 181 —one incumbent judge and 180 others. Except for the 17 incumbent judges, there were not two dozen candidates in the combined lists who could be said to possess a substantial general reputation in the city and county; and it is safe to say that even among those few better-known candidates, there was not one who was known even by name to as many as half the voters in that community of nearly two million people. The overwhelming majority of candidates were utterly unknown to 95 per cent of the voters, and many were known to nobody at all outside their own small groups of personal acquaintances.

It was urgently necessary, therefore, to obtain information and to advise the public in regard to the various candidates. This work was undertaken by three civic bodies, and their recommendations were repeatedly published and approved in the newspapers of the city.

Appraising the Candidates

In Detroit there is a very useful and high-class organization called the Citizens League, supported by voluntary subscriptions, and effectively organized with a capable director. It publishes regularly a periodical devoted to civic affairs. The League undertook to investigate the various candidates with a view to recommending such as were found worthy. This work was carried out thoroughly, not only by mail but also by personal visits to the offices or the homes of candidates with whom contact could not be established by letter. The results were published in the League's periodical, The Civic Searchlight.

This survey was highly revealing. The most desirable candidates were designated as "preferred," others who were regarded as eligible were marked "qualified." The rest were merely listed

with such information as could be obtained. Excepting one judge who was deemed too ill to continue in office, all the incumbent judges were marked "preferred"—15 Republicans and one Democrat. Two other Republicans and 18 Democrats were marked "preferred," and 4 Republicans and 22 Democrats were marked "qualified." The other 18 Republicans and 140 Democrats were given no commendation.

The mass of candidates not "qualified" included an amazing array of cheap politicians and nonentities. There were habitual office seekers who dropped into the primary (chiefly the Democratic primary) in the hope of riding into a job on the crest of a political wave. (Some of these were lifelong Republicans who flopped for the nonce.) There were obscure individuals who filed in the primary to gain publicity. There were lawyers who had no practice, and some whose practice was not favorably known; there were young men just out of law school; there were men who only recently had become residents of the county. Twenty-seven candidates had been attorneys less than 10 years; nine, less than 5 years; two for only 2 years. Some who could not be located or identified may not have been admitted to the bar. Many had no ascertainable offices. In the case of twenty-one candidates the Citizens League could find out nothing whatever in addition to their ostensible street addresses.

Other very important investigations were made by the Detroit Bar Association and the Wayne County Bar Association by means of questionnaires addressed to their members. As this was done after the primary, and related only to candidates actually nominated, the results are not pertinent at this point. It is worth noting, however, that even of the eighteen Democratic candidates who were nominated, twelve were unknown to from 30 per cent to 66 per cent of the attorneys answering the Detroit Bar questionnaire.

One circuit judge who had practiced law in Detroit for twenty-two years and sat twelve years on the bench stated to me that 70 per cent of the Democratic candidates were men of whom he had never heard, and another judge with twenty years' experience on the bench and at the bar gave the same proportion. A third judge who has sat for fifteen years, said "more than two thirds." In short, the primary—more particularly the Democratic primary—was more like a lottery than an election. It was a free-for-all scramble, in which nobody could expect a majority but many had hopes of being among the eighteen highest.

Electioneering

The natural result was an orgy of electioneering such as probably never before was carried on for judicial office. It was carried on in every form—by signs, posters, radio, advertisements, circulars, dodgers, letters, post cards, hired workers, speeches, and personal solicitation.

The visitor in Detroit beheld a mass of outdoor judicial display advertising that beggars description. A salesman of billboard advertising a day or two before the primary said that every billboard in the city had been sold—for the first time in the city's history. The billboard business knows two periods of peak demand: one is a political campaign in which many inexperienced candidates take part; the other is when two circuses come to town at the same time. Ordinarily the latter creates the greater demand; but the judicial primary, the salesman said, was "even better than two circuses."

Besides the permanent billboards, which advertised candidates in about two hundred locations (many of them lighted at night), posters in all colors were massed on every available blank wall and dilapidated building—ten, twenty, fifty, or as many as the spot would hold. According to a reliable estimate there were at least three thousand such masses of gaudy publicity.

As the election drew near, the newspapers were filled with advertisements of judicial candidates and advertisements of partisan organizations in behalf of certain groups of candidates.

How Judges Campaign

The personal activity of candidates was limited only by their physical endurance. In this feverish personal campaigning the incumbent judges were forced to take an active part, and as a fair sample of such activity I will recount briefly the experiences of a typical evening spent with one of them.

It began at a banquet given by the Republican state central committee, where I was seated at a table with my host and half a dozen other judges. As the speaking began, the jurists quietly withdrew and I accompanied my host to another banquet—this one given by a fraternal order—where he made a short speech and presently went away.

The next stop was at a club festivity where about seven hundred men were crowded in a great hall filled with smoke and hilarious uproar, above which the music of a band could be heard at times. Few knew the judge was there, and still fewer could hear his brief remarks from the stage; but he had left the desired impression with the club officers and committee members.

A ten-minutes' drive through dark streets brought us to a meeting of the garbage truck drivers' union, all negroes. After a momentary delay at the door while an unconscious member was being carried out, we were ushered to front seats and the judge was greeted by the union officers and received the applause of the meeting. Other judicial candidates were there, one of whom was speaking when we left.

A brief visit at a meeting of the furniture salesmen's union was followed by a longer stop at a benefit ball given by the Republican Women's Clubs at one of the leading hotels.

It was now midnight, and the last call took us up another dark street to Mike Mulligan's, a low-grade drinking place in a dingy dwelling whose proprietor was somewhat active in small-time politics. It was a dreary looking place, with plainly dressed men and women being served at tables from a bar. But it was a hangout of political value, for as we entered we met a judge, and a little later still another judge came in. My host during our short stay was importuned by two women to recommend a brother and a cousin for political jobs.

And, as Pepys says, so home at one o'clock, tired and right sorry that court must open at nine-thirty the same morning.

This, as I said, was a typical evening for a judge during the primary campaign. Some, more particularly the older ones, did not try to visit so many places; some managed to visit even more between the adjournment of court and late bedtime. One told me that few of the circuit judges had spent a single evening at home during January and February unless by reason of illness.

Such campaigning was very irksome and distasteful to the judges. They did it only because they considered it necessary, and they did it with propriety and with as much dignity as possible. Many of the non-incumbent candidates were less punctilious. One of them, for example, visited political gatherings with a troupe of barelegged girls in stage dress who passed out his cards to the audience.

Unethical Methods

In such a campaign it was inevitable that unethical tactics should be employed, and there were abundant examples. The first and simplest was the device, long familiar in Detroit politics, of petitions filed by obscure persons who happened to bear the names of prominent men.

As the campaign developed, the advertising of various candidates gave grounds for criticism. Among the deceptive advertisements was one

headed "Re-elect Judge Blank," the candidate never having occupied the position sought, but having once served a short time as judge of an inferior court. Posters and advertisements for three candidates, running for the circuit recorder's, and traffic courts, respectively, were so worded and printed that the reader might infer that they were already judges.

The appeals of candidates included almost anything that might attract votes. A pair of brothers, both candidates for the circuit bench, advertised very extensively on billboards and in printed matter a pledge to save the taxpayers $43,200 by remitting part of their salaries if elected. Another promised to devote two hours each day, after adjourning court, to giving free legal advice to the public. Another promised "a liberal construction of the law in keeping with the ideals of the New Deal."

Slogans were much in favor. One had a slogan, "Let's humanize justice!" Another candidate —a young lawyer four years at the bar, whose advertisement indicated that he was already a judge—used the inspiriting words, "Succeed With Successful Steiner." Just what that was intended to mean has never been explained, but it is perhaps as lucid as the slogan of another candidate which proclaimed from the billboards, "His Record Protects You!"

Perhaps the most offensive examples, however, were two large blue posters bearing cartoons. One showed at the left a ruthless employer firing a man because he was forty-five years old, and at the right a judge on the bench saying: "Men over forty shall not be forgotten; the right to live and let live shall prevail over the right of money to make more money." The other poster pictured a wretched man evicted from his home, with the words: "If we had men like Edward C. Moran in office this wouldn't have happened."

The advertised qualifications of candidates recited almost everything from "humane justice" to "demanding better living conditions for everybody." One aspirant's advertisement gave nothing but his name and the fact that he was "president of the Detroit Basketball Association and a member of the municipal athletic commission." Another called himself "the ablest trial lawyer in Detroit." Still another contained the touching announcement: "My greatest treasures are my wife and seven children."

Results of the Primary

In the returns of the primary election on March 4, certain outstanding features are to be noted.

1. The total vote was a very inadequate expression of the electorate. Wayne County cast 543,601 votes in the last presidential election; yet in spite of all the political ballyhoo, and the urgings of the press and the civic organizations, only 186,965 persons voted in the primary—almost exactly one third of the 1932 total.

2. All nominees were chosen by minorities of their own parties. The Republicans cast 79,759 votes and most of the eighteen winners (all incumbent judges except one) received more than half of the votes cast, the highest polling 45,985. Even that, however, was only about one fifth of the Republican voting strength in 1932, and less than one tenth of the registered voters. The lowest of the winners, not an incumbent judge, received 20,299—one quarter of the Republican primary votes, one eleventh of the party's vote in 1932, and one twenty-seventh of the total registered vote of the county.

The Democrats cast 107,206, of which the highest winner got about 26,000, or one quarter —5 per cent of all registered voters. The lowest winner was nominated by about 10,000 voters —10 per cent of the party vote, 5 per cent of the 1932 party voting strength, and 2 per cent of all registered voters.

3. Efforts to inform and advise the public disinterestedly had much less effect than might have been expected. That observation applies more especially to the Democratic primary, where such help was most needed, but where it had little influence.

On the Republican primary ticket the sixteen incumbent judges and two non-incumbents were recommended by the Citizens League and they were all nominated. The nomination of the incumbent judges, however, was a foregone conclusion because of their prominence, their records, and the fact that they had no serious opposition. Prominent lawyers were not inclined to oppose them; in fact, only four of the nineteen other candidates were classed by the League as even "qualified." Even the two successful non-incumbents probably would have won without the League's recommendation, as they were well and favorably known.

On the Democratic ticket, where all candidates but one were non-incumbents, such recommendations should have had great effect, but in reality they had little.

Nine were unanimously preferred by all three organizations and by two of the three newspapers, the third paper making no recommendations,

Of these nine, only two were among the winners.

In addition, eight were recommended by two of the organizations and by both papers. Of these, only two were nominated.

Seven of the nine thus unanimously approved by five disinterested advisers were scattered among the long list of losers—the highest of them thirty-second from the top, with about half the average vote of the winners; the lowest, more than a hundred from the top.

The Polish Bloc

Obviously some influence was operating more strongly than the disinterested advice of the bar, the press, and the Citizens League. That influence may easily be guessed when, among the eighteen Democratic winners, the eye catches the names Stolinski, Koscinski, Dombrowski, Majewski, Lutomski, Bahorski, Bonczak, and Kolodziejski, with Messrs. Kuschinski and Kulaski near the top of the losers.

In short, that influence was what is known as the "Polish bloc." There are in Wayne County, according to the last census, 88,478 Polish-born, and 139,982 native-born of Polish parentage. Altogether the "Polish bloc" is reputed to dispose of at least 60,000 votes (some say 100,000), which are largely concentrated in two regions of the city. Strongly organized, and voting solidly under the leadership of its Democratic bosses, this large and well-controlled mass of voters has lately been influential in both city and state politics.

Generally speaking, the Polish judicial candidates actually nominated were little known in the city at large. In fact most of them were little known even among the lawyers In the poll of members of the Detroit Bar Association, the best known of the Polish candidates was unknown to 238 lawyers out of 624 answering that question, and some of them were unknown to as many as 425, or more than two thirds of those answering.

It would seem rather difficult to prove the judicial fitness of lawyer candidates who are unknown to so many of the most active members of their local bar. Yet these eight were nominated—six of them, including some of the least known, being in the top half of the list of winners. One of them—unknown to a little over half of the lawyers in the bar association poll —was next to the top, his total nearly equaling that of the one Democratic incumbent judge who was widely known, highly esteemed, and recommended by all three civic organizations and the

newspapers. Obviously the Polish vote was effectively mobilized in the primary.

The Election

The month between the primary and the election was filled with similar campaign activity, equally active but less extensive because the field of candidates had been reduced to eighteen on a side.

The advertising of candidates was free from such serious objections as arose in the primary campaign, though various advertisements were the subject of criticism. A vicious attack was made upon the Republican judges in an eight-page newspaper of tabloid size and dubious origin, two issues of which were printed and distributed through the city. In huge red and black type it accused the judges of loafing on their jobs, wasting the people's money, and other shortcomings.

A similar attack, hardly less violent though more restrained in form, appeared as a page newspaper advertisement by the county Democratic committee the day before the election. This advertisement also contained a bitter attack on the judges, based upon the conduct of recent receiverships. This was answered in the same newspapers in a large advertisement by the judges, pointing out that the subject had been fully investigated by the Democratic attorney-general of Michigan, whose report completely disproved all charges and approved the actions of the court.

The most informative advertisement was one of half-page size by the Detroit Bar Association, giving the results of a poll of its members which has already been alluded to. The response as to the seventeen incumbent candidates (sixteen Republican and one Democratic) was, of course, highly favorable. The same was true of two Republican non-incumbents, and to a less degree of two Democrats. As to all the other Democratic candidates, the verdict was adverse. On six Polish candidates the adverse vote varied from 5 to 1 up to 14 to 1, those candidates being unknown to from 30 per cent to 66 per cent of the attorneys polled.

The incumbent judges were supported by two of the Detroit newspapers, while the third confined its recommendations to four Republicans and four Democrats, the first four being incumbent judges.

The returns showed the election of all eighteen Republican candidates, the highest receiving about 154,000 votes and the lowest about 121,000. The highest Democrat, the one Democratic

incumbent judge, received about 115,000; the others from 84,000 to 99,000.

The total of all votes was less than half the number cast in 1932.

How It Happened

The result was highly satisfactory to all who were solicitous for good administration of the law. In fact it was in every respect gratifying, except for the defeat of the one Democratic incumbent judge who ought to have been among the winners.

It would be pleasant to believe that this outcome was due to the discriminating judgment of voters who thought only of the public good. A short-sighted optimist might say that the elective method of choosing judges was vindicated; that merit is bound to win; that the people can always be trusted in an emergency.

But it was not disinterested judgment and thoughtful choice that elected those eighteen judges. The result was wholly a matter of party politics. Party politics threatened to wreck the circuit bench; an unexpected turn in party politics saved it. The eighteen Republican judicial candidates were swept into office by the same political wave that gave victory to all Republican candidates in Wayne County, judicial and non-judicial, which elected sixty-five Republican circuit judges out of sixty-eight in the entire state, and which elected all Republican state officers by majorities around a hundred thousand.

The reaction against the Democratic victory of 1932 began in 1934, when, owing to dissatisfaction with the Democratic state administration, the Republicans again elected a governor and certain other state officers. After the election that reaction was aggravated by a gross political blunder committed by Democrats in the legislature, who, late in December, as the session was expiring, tried to authorize a recount of votes in an effort to save a Democratic State officer who had been defeated by a substantial majority.

Though the action was illegal and void, owing to the absence of a quorum, and later was so declared by the courts, a so-called recount of ballots in Detroit was held which pretended to count out the elected official. It was marked by such irregularities as to lead to an investigation by a committee of the legislature, and to a grand jury inquiry which is still in progress in Detroit. A prominent figure in the recount matter was a Polish member of the legislature from Detroit, who refused to testify before the grand jury until threatened with an indefinite jail sentence for contempt of court, and petty Polish Democratic

political workers took part in the actual recount of ballots in which frauds were testified to in the grand jury inquiry. The daily developments of that inquiry, which was public, aroused the resentment of many Detroit voters against the "Polish bloc."

If it had not been for a strong Republican reaction in Michigan, intensified in Detroit by the malodorous "recount" affair, the result would almost certainly have been different. Even as it was, a change of 25,000 votes in a registered electorate of 543,000 might have elected half of the eighteen Democrats, and a change of 30,000 would easily have elected all of them, including the seven Polish candidates at the bottom of the list. If the election had been held in the fall of 1932, or even in the spring of 1933, that would almost certainly have been the result; for it would have been a political verdict then, just as it was a political verdict this year.

The strong hand of politics was conspicuous at all times. In both the primary and electoral campaigns, appeals were made on purely political grounds by candidates and by party organizations.

The complete submergence of the judicial election in politics was vividly revealed by the action of the circuit court itself, when it refused to let any of its judges hear a case involving a contest over the election of the sheriff of Wayne County. "We agree," said one of the judges, "that no Wayne County judge should try this case. Believing that in the heat of our own campaign it was not proper for us to try it, we asked Judge Dingeman to assign an outside judge."

Thus an honest and scrupulous bench of judges admitted that politics had so destroyed its independence that it could not perform its proper functions.

Lack of space precludes an analysis of the interesting nonpartisan nomination and election of seventeen judges of courts other than the circuit court. I may say briefly, however, that the primary campaign of the eighty-eight candidates for these courts was carried on by the same methods used in the party primary, and gave rise to similar objectionable practices. Except for the absence of organized party support, the nonpartisan primary was open to every objection that could be urged against the party primary. The results also were determined by the Republican political reaction previously described.

Conclusions

The conclusions from the Detroit elections may be summarized as follows:

1. When the electorate is large, and especially

when there are many candidates, it is impossible for most voters to appraise the judicial fitness of candidates.

2. The most important judicial election in the city's history failed to bring out even one half of the voters.

3. Efforts to inform and advise the voters are of indefinite and doubtful value.

4. When the circumstances of an election arouse partisan feeling, politics submerges all other considerations and determines the results.

5. In such cases the appeals and activities of organized groups may control the outcome.

6. The submergence of the campaign in politics absorbs the energies of judges, destroys during the campaign their independence in matters involving political factors, and creates obligations which cannot fail in some degree to hamper them later.

7. The necessity of personally appealing for votes forces judges into the campaign methods of ordinary politicians, and tempts candidates to resort to objectionable tactics.

8. The result is a test of personal popularity or political favor, rather than of judicial fitness.

9. Little is gained by nominating and electing judges on so-called nonpartisan ballots, which at best only substitutes personal politics for party politics.

The travesty at Detroit so fully demonstrates the evils of the elective plan of choosing judges that a more general discussion of that subject would be superfluous at this time. This case and many similar but less egregious cases shatter the delusion that judges must be "close to the people" and responsible to public sentiment—a delusion which is based on a complete misunderstanding and perversion of the principle of representative government, and which has been assiduously cultivated by politicians for selfish purposes.

To work for a change of this vicious system is a clear and urgent duty. And such change should be radically thorough; efforts directed merely toward the improvement of the present system and the mitigation of its evils tend to delay or prevent effective reform. At the meeting of the American Bar Association three years ago I used these words:

In this campaign of reform it seems to me too early to begin to consider compromises, for intelligent public opinion is moving with surprising rapidity in the direction of appointment and life tenure for judges.

Since then the movement referred to has strikingly accelerated. California has actually adopted

a constitutional amendment that puts the judiciary on a modified appointive basis. In Michigan a similar amendment was recently rejected by a small majority of votes in the State Senate, its submission to the people being blocked largely through unwholesome influences proceeding from Detroit. It is interesting to note that the movement for this change originated not among lawyers but at a conference of civic organizations called by the Michigan Farm Bureau.

A constitutional amendment providing for the nonpartisan nomination and election of judges was actually submitted in Michigan in the fall of 1934, but, though receiving a large majority in Wayne County, where the evils of the present system are so evident, it was defeated by outstate votes. The newspapers in which I am interested, and many others, opposed it on the ground that it was a feeble palliative that would accomplish no genuine reform.

In Indiana and Oklahoma, committees appointed by the governors have recommended constitutional amendments providing for judicial appointment; and in Florida, Kansas, Ohio, South Dakota, Utah, and Wisconsin, similar amendments are being discussed or drafted by State bar associations for submission to the legislatures. The so-called Georgia plan of appointment, contained in the draft of a model constitution for that State, has attracted much interest and favorable comment.

So the prospect is distinctly encouraging. Reform not merely is to be hoped for in the course of time; it is clearly on its way. In some states it may fairly be called imminent; and even in states where no demand for reform has yet been manifested, the idea may germinate at any time and bear early fruit. And it is especially noteworthy that public opinion is now to be reckoned with not as an opponent but as an ally of reform. The influence of the bar everywhere may be counted on as favorable, either now or in the near future. The press can equally be counted upon as a strong ally, and the same is true of a great number of disinterested civic bodies.

Therefore thoughtful Americans who see the vital necessity of freeing the administration of law from the blighting affliction of politics no longer need feel that their voice is like that of one preaching in the wilderness, but that it expresses a profound and increasing popular demand. Much work must yet be done. It will be arduous at times, and not free from disappointments. But the end justifies all possible exertion, and ultimate success now seems to be assured.

(The following was received while this number was on the press and is squeezed in for the convenience of the bar. Ed.)

NEW RULES AS TO CONSOLIDATION FOR TRIAL OF CASES ARISING FROM THE SAME MOTOR VEHICLE ACCIDENT.

COMMONWEALTH OF MASSACHUSETTS.

By action taken by the Justices of the Appellate Divisions of the District Courts and the Chief Justice of the Municipal Court of the City of Boston, the following rules are made and promulgated under the provisions of St. 1935, chap. 483, effective as of October 1st, 1935.

Attest:

WILFRED BOLSTER,
Chief Justice of the Municipal Court of the City of Boston.

PHILIP S. PARKER,
NATHANIEL N. JONES,
CHARLES L. HIBBARD,
Presiding Justices of the Appellate Divisions of the District Courts.

RULES OF THE DISTRICT COURTS OF THE COMMONWEALTH OF MASSACHUSETTS MADE AND PROMULGATED UNDER THE PROVISIONS AND BY THE AUTHORITY OF ST. 1935, CHAP. 483.

1. A party who moves for the consolidation and trial together of actions of tort growing out of an accident in which a motor vehicle or trailer is involved shall file his motion in the court in which his action is pending. The party making such motion shall annex thereto a certificate showing that he has given the notices required by law and the time and manner of giving the same. Such notices shall contain a statement of the time of filing such motion. The clerk shall note upon the motion and docket the day and hour of the filing of the same. The said motion and certificate shall then be forwarded forthwith by the clerk to the presiding justice of the Appellate Division of the said court. The filing of such motion with the clerk shall be deemed to be a filing with the Appellate Division. All notices received by a clerk of the filing of a motion for consolidation in another court shall be docketed by him in the proper case and shall then be forwarded to the presiding justice of his Appellate Division.

2. Such motions shall be set down for hearing at the next sitting of the Appellate Division of the court where they are filed.

3. Upon allowance of any such motion the Appellate Division shall make an order providing for the consolidated trial of the actions involved and copies of such order shall be forwarded to the clerks of the courts in which such actions are pending. Copies of the writ and return thereon, a copy of the docket entries, and of such other pleadings and papers as are necessary to define the issues for trial shall be forwarded to the trial court. Originals of interrogatories and answers to such interrogatories and depositions shall also be forwarded with such copies. The clerk of the court of origin shall also forward to the trial court such further papers as the trial court may request.

4. If all the parties to any such actions agree upon such consolidation and trial together, the order therefor may be signed by the presiding justice alone.

5. All questions of law arising at the trial shall be reported to the Appellate Division of the court of trial. When the finding in any of the cases so transferred shall have become final the clerk of the trial court shall unless that court otherwise orders, certify the finding to the court of origin and shall return all original papers received from it together with a copy of all special findings made in such case and judgment shall thereupon be entered accordingly in the court of origin. All motions for new trials made before such certification shall be filed and heard by the court of trial. All motions for new trials for any cause made after such certification shall be filed in the court of trial and the clerk of such court shall immediately notify the court of origin of the filing of such a motion and entry of judgment shall be delayed until the court of origin receives a certification of the disposition of such motion.

6. Whenever in these rules any reference is made to the presiding justice, in the Municipal Court of the City of Boston it shall be deemed to be the Chief Justice of that court.